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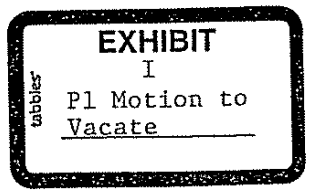
ATTORNEYS FOR RESPONDENT AND COUNTER-CLAIMANT
DSD DISTRIBUTORS, INC.

IN ARBITRATION PROCEEDINGS AT JAMS BETWEEN

HANSEN BEVERAGE COMPANY CLAIMANT AND COUNTER-RESPONDENT, VS. DSD DISTRIBUTORS, INC. RESPONDENT AND COUNTER-CLAIMANT.	JAMS REFERENCE NO. 1200039281 **DSD'S OBJECTIONS TO INTERIM AWARD AND REQUEST FOR HEARING** ARBITRATOR: HON. RICHARD HADEN (RET.)



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I. INTRODUCTION

DSD thanks the Arbitrator for the interim award and for this opportunity to object before it becomes final. DSD is grateful for the Arbitrator's finding that DSD is a dealer under the Wisconsin Fair Dealership Law ("WFDL"), but objects to the interim award's conclusion that DSD is not the prevailing party, is not entitled to damages, and is not entitled to attorneys' fees. Accordingly, DSD **requests a hearing** on these objections and, to the extent Hansen opposes DSD's objections, an opportunity to file a responsive brief.

The Wisconsin legislature's express intent behind the WFDL was to protect dealers from the heavy-handed acts of unscrupulous grantors. Were the interim award to become final as it currently stands, it would effectively allow Hansen to have gotten away with just those heavy-handed tactics, by allowing Hansen to have required its dealer to incur significant attorneys' fees to defend against a lawsuit in a distant forum alleging nine different theories of breach of contract as well as claims for declaratory relief trying to strip DSD of its WFDL dealer status and protections – all of which proved meritless.

DSD prevailed on all of these important issues – both Hansen's monetary and non-monetary claims – and DSD should therefore be considered the prevailing party and entitled to its attorneys' fees. The fact that DSD raised two claims for WFDL violations in the context of a compulsory counterclaim and sought protection under the WFDL under Hansen's own lawsuit should not deprive DSD from recovering any of its attorneys' fees in defending against Hansen's meritless claims.

DSD further objects to the interim award on the basis that it does not fully address DSD's counterclaims. First, the interim award does not address DSD's first claim – the notice claim under section 135.04. Setting aside whether there was a violation of section 135.03 under a constructive termination theory (DSD's second counterclaim), there realistically can be no dispute that Hansen violated the WFDL by failing to give notice pursuant to section 135.04 before undertaking substantial changes in the competitive circumstances of the dealership (which is a separate issue from the competitive

circumstances of the "dealership agreement" under section 135.03). Specifically, Hansen went from authorizing DSD's distribution of all Hansen products and all Monster products to suddenly not authorizing the Java Monster and instead giving the distribution rights for Java to competing Anheuser Busch distributors in DSD's own territory. This constituted a substantial change in competitive circumstances of the dealership. Case law is very clear that substantial changes in the competitive circumstances of a dealership can occur – and trigger the notice requirement under section 135.04 (which does not reference dealership "agreement") – ***even if*** such changes are permitted by the terms of the dealership agreement.

Second, the interim award also does not fully address DSD's constructive termination claim under section 135.03 of the WFDL. Specifically, it does not address crucial evidence as to why the April 25, 2007 letter did not constructively terminate the agreement. To the extent any contradiction exists in the termination notice, it should be construed against Hansen, not against DSD. It also does not address case law, both within the Super Valu decision and subsequent to that decision, that contemplates "termination" of a dealership agreement by changes to competitive circumstances that, even though permitted by the agreement, are so large that they drive the dealer out of business.

Accordingly, DSD respectfully objects that a conclusion that DSD is a dealer under the WFDL but that it is not the prevailing party, is not entitled to damages, and is not entitled to its attorneys' fees, is inherently inconsistent with the statutory and public policy of the WFDL. The final award should find that DSD is not the prevailing party because it prevailed on the important declaratory relief claims and was found to be a dealer under the WFDL and Hansen was thus found not to have had good cause to terminate DSD. Furthermore, the final award should, in fact, find that Hansen violated the WFDL, and thus is liable for damages.

II. ARGUMENT

A. DSD Is The Prevailing Party And Should Be Awarded Its Fees.

The WFDL is expressly intended to protect dealers against the overreaching of aggressive grantors. With a finding that DSD is a dealer and Hansen a grantor under the WFDL, a determination that DSD is not entitled to any attorneys' fees, in light of all of Hansen's actions over the last year and Hansen's stance in this arbitration, is inherently inconsistent with DSD's status as a protected dealer under the WFDL.

It is undisputed that Hansen, not DSD, initiated this arbitration. It is also undisputed that Hansen lost on every single material claim in this arbitration. Hansen sought both damages – based on nine different theories of breach of contract plus on breach of implied covenant of good faith and fair dealing – as well as a declaration that the WFDL did not apply, that the agreement's arbitration provision is enforceable, and that Hansen is entitled to terminate the agreement in accordance with its terms. (*See* Hansen's Demand for Arbitration) Hansen has lost on every single claim (except for the procedural issue that the arbitration provision is enforceable, which does not reach the merits[1]).

The interim award's ultimate finding that DSD is still not the prevailing party or entitled to any attorneys' fees because each party has prevailed on "equally important issues" (p. 16, lns. 9-10) runs counter to the express purpose of the WFDL. Even if DSD were to have lost on its two counterclaims, it should still receive an award of attorneys' fees. Further because DSD was found to be a dealer under the WFDL and because Hansen was found not to have had good cause to terminate DSD, the parties have not "prevailed on equally important issues."

First, this decision makes DSD – the dealer – bear the extraordinary burden and expense of having had to arbitrate a wholly meritless action in California, even though DSD really had no choice but to do exactly what it did. The purpose of Hansen's actions

[1] As the interim award notes, DSD has participated in this arbitration under a reservation of rights, and Hansen also filed a federal action on this issue, which is presently stayed.

is clear – to force DSD to relinquish its statutory rights by attempting to evade the WFDL and, in the process, to ensure that any related litigation would be as costly and as time-consuming as possible. **DSD could not have simply walked away and ceased distribution because it then would have been liable for breaching the distribution agreement.** DSD also could not have declined to participate in the arbitration because then it would have risked adverse findings that it was not a dealer and/or had breached the agreement. DSD had no choice but to come and participate in this arbitration. DSD also had no choice but to file any counterclaims under the WFDL because those were compulsory. Hansen – not DSD – placed the parties in this litigation, DSD prevailed in each of Hansen's substantive claims – including Hansen's effort to strip DSD of its protections under the WFDL – and yet DSD is being denied the very protection afforded by the WFDL by being forced to pay for its substantial attorneys' fees in fighting this fight.

Second, DSD submits that the interim award does not reflect a fair balance of the claims that were at issue in this case. Hansen raised and vigorously litigated ten claims for monetary damages – nine claims based on breach of contract and one for breach of implied covenant of good faith and fair dealing. Hansen also raised three non-monetary declaratory relief claims, the two substantive ones[2] being that the WFDL did not apply and that Hansen is entitled to terminate the agreement in accordance with its terms. Hansen lost not only on its numerous damages claims, but also on the substantive declaratory relief claims. By definition, DSD therefore prevailed on the declaratory relief claims. Not only does the WFDL apply, but DSD is a dealer, and thus Hansen is not entitled to terminate the dealership agreement pursuant to its terms, but rather only upon good cause as provided by the WFDL.

DSD, for its part, only raised two damages claims (as opposed to ten damages claims plus various declaratory relief claims). More important, DSD did not initiate this arbitration to bring its claims against Hansen, but only raised those two claims in the

[2] Except for the arbitrability issue which, again, is on hold.

context of a compulsory counterclaim, as part of DSD's overall effort to gain the fullest protection possible under the WFDL in the context of its defense against Hansen's aggressive lawsuits. DSD is effectively being punished simply for seeking the fullest defense and protection under the WFDL – which the interim award has now found applies to this relationship.

Had Hansen simply brought claims for declaratory relief, rather than the numerous damages claims, this arbitration would have been much faster and cheaper. Further, even if one were, for the sake of simplicity, to assume that the time and effort associated with litigating DSD's counterclaims for damages roughly equal the time and effort associated with litigating Hansen's ten claims for damages (which they clearly do not), DSD still expended a significant – indeed the majority – if its time and resources litigating the declaratory relief claims as to DSD's status as a protected dealer. Accordingly, at the very least, DSD should be entitled to fees associated with prevailing on this effort.

Furthermore, the denial of DSD's attorneys' fees on the basis that DSD, too, lost on its two damages counterclaims is particularly unfair when one considers that Hansen raised its main defense – that it preserved the status quo through arbitration and Hansen intends to honor the agreement if DSD is adjudicated a dealer – for the first time during Hansen's opening argument. (Interim Award, p. 15.) Hansen never articulated this argument until its opening argument at arbitration. Hansen also never filed an answer to DSD's counterclaim. While the interim award notes that the April 25, 2007 letter supposedly notified DSD that the agreement would remain in force until subsequent written notice of termination was provided – Hansen's purported intention to preserve the dealership agreement through the pendancy of the arbitration was undermined by the fact that Hansen ***sued DSD the same day as this letter*** seeking declaratory relief precisely on Hansen's right to terminate and, shortly thereafter, chose to not authorize DSD's distribution of the Java Monster products.

The interim award is not an outcome that was envisioned by the drafters of the WFDL. If the interim award becomes final in its present form, Hansen will have

successfully accomplished the very aggressive and heavy handed type of grantor tactics that the WFDL was intended to prevent: suing its distributor in multiple out-of-state forums to force them to litigate against nine different theories of breach of contract and to defend its very status as a distributor under the WFDL. DSD had no alternative but to defend itself against Hansen's frivolous breach of contract claims and file its compulsory counterclaims. DSD should not be precluded from recovering its attorneys fees simply because it defended its rights as a dealer. Rather, the final award should effectuate the purpose of the WFDL by appropriately balancing the claims at issue, recognizing that DSD prevailed on the most important issues, and finding DSD to be the prevailing party and entitled to its attorneys' fees.

B. The Interim Award Does Not Address At All DSD's First Counterclaim For Notice Violation Under 135.04, And Does Not Fully Address DSD's Counterclaim for Constructive Termination Under 135.03.

1. Hansen Violated Section 135.04 By Failing To Provide Statutory Notice Before Substantially Changing The Dealership's Competitive Circumstances. The Interim Award Does Not Address DSD's Notice Claim.

DSD's first claim in its counterclaim is for violation of the WFDL's notice provision at section 135.04. The interim award, however, does not appear to address or render any opinion on this claim. Rather, the interim award only focuses on whether constructive termination occurred without good cause in violation of section 135.03. The case of Super Valu, on which the interim award relies on this issue, also only addresses whether contractually permitted changes can give rise to a violation of section 135.03.

A significant body of WFDL case law holds, however, that even if certain grantor actions are permitted under section 135.03, those actions may still violate section 135.04 if the grantor fails to give proper notice. The reason for this rule, and the basis upon which the cases decidedly distinguish Super Valu, is that section 135.04 is not confined

to changes in the "competitive circumstances of a dealership agreement" (as is section 135.03), but rather relates more broadly to changes in "competitive circumstances." Accordingly, while substantial changes in competitive circumstances that are permitted by the agreement may not constitute changes in competitive circumstances of the dealership agreement so as to trigger the good cause requirement of section 135.03, they will nevertheless constitute substantial changes in the competitive circumstances of the dealership more generally so as to trigger the notice requirement of section 135.04.

Section 135.04 does not reference a "dealership agreement" and provides:

> "Except as provided in this section, a grantor shall provide a dealer at least 90 days' prior written notice of termination, cancellation, nonrenewal or substantial change ***in competitive circumstances***. The notice shall state all the reasons for termination, cancellation, nonrenewal or substantial change in competitive circumstances and shall provide that the dealer has 60 days in which to rectify any claimed deficiency. If the deficiency is rectified within 60 days the notice shall be void."

Wis. Stat. § 135.04, emphasis added.

The leading case on this issue is the Wisconsin Supreme Court case of Jungbluth v. Hometown, Inc., 201 Wis.2d 320 (1996) (*See* **Exhibit A**). In Jungbluth, the dealer (a franchisee service station) sued the grantor (the franchisor) for violating section 135.04's notice provision by failing to give notice prior to undertaking renovation to the service station. Id. at 323-24. The Wisconsin Court of Appeal, finding ambiguity in the statute, read the terms "dealership agreement" into section 135.04 so as to harmonize this section with section 135.03 (which references "dealership agreement"). Id. at 326. Accordingly, the Court of Appeal found no violation of section 135.04 because there were no changes to the competitive circumstances of the dealership agreement since the renovation was permitted under the agreement. Id. at 326-27.

The Wisconsin Supreme Court rejected this approach and reversed the Court of Appeal. The Court reasoned:

> "Judicial protection of the terms of the agreement, rather than the individual dealer, or his business, systematically elevates the rights of the grantor over those of the dealer. We find that this outcome runs contrary to the explicit purpose of the WFDL 'to protect dealers against unfair treatment by

> grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships.'"

Id. at 330. The Court continued:

> "A decision which clearly strengthens the relative position of grantors at the expense of dealers does not embrace the spirit of the fair dealership law. We cannot conclude that the WFDL was formulated to simply protect the dealership agreement. Limiting the protective scope of this regulatory scheme to the terms of the grantor-generated contract obfuscates the question of who should be protected by the statute. While we recognize that the dealership agreement is essential in defining the various terms of the business relationship between the parties, we are also mindful that the relationship itself can be one-sided, typically characterized by unequal bargaining power and economic dependence. ***Therefore, one should not focus merely upon contractual provisions***. By doing so, the shared financial interests and interdependence which creates a community of interest among the parties may be overlooked."

Id. at 330-31 (emphasis added).

The Court then explained that the statutory notice requirement in section 135.04 "is designed to afford the dealership the opportunity to react and protect itself from the potentially devastating affects of an overreaching grantor, who with superior bargaining power, changes the competitive circumstances, not of the dealership agreement, but rather the business itself." Id., at 331. The Court continued:

> "Even in cases such as this one, where there are no deficiencies for a dealer to cure, it furthers the Act's policy of fairness in business relations to require the grantor to provide the dealer with notice of an impending change in his *business circumstances*. For even if the dealer is without power to rectify the problem and forestall future changes in his business operations, fairness would provide him with a reasonable opportunity to arrange for the orderly accomplishment of whatever changes are to be wrought, including, if necessary, the investigation of new dealership opportunities."

Id. at 332 (emphasis original).

Accordingly, the Court held that "[the grantor's] position that the remodeling project was permitted under the dealership agreement, and therefore required no notice, despite the project's dramatic effect on [the dealer's] business circumstances, contravenes the equitable principles encompassed within the notice provision of the WFDL." Id. at 333. In reversing the Court of Appeal and awarding damages to the dealer, the Court concluded that "***[t]he fact that the dealership agreement permitted [the grantor] to act***

in this regard did not relieve it from the obligation of formal notification prior to the impending action." Id. at 336 (emphasis added).

In 2006, the Wisconsin Federal Court, in the case of Techmaster, Inc. v. Compact Automation Products, LLC, 462 F.Supp.2d 932 (W.D. Wis. 2006) (**Exhibit B**), cited the 1996 Jungbluth decision as a basis for distinguishing the 1988 decision of Super Valu so as to find a section 135.04 notice violation even where there was no section 135.03 violation because the agreement permitted the grantor's actions. In Techmaster, the Court noted that "[b]efore 1996, a number of courts had ruled that a grantor did not violate § 135.03 of the fair dealership law by making a substantial change in competitive circumstances if the parties' agreement allowed the change." Id. at 941 (citing Super Valu and two earlier federal decisions). The Court then analyzed the Jungbluth decision at length, and concluded as follows:

> "In holding that Jungbluth [the dealer] could recover damages for his supplier's failure to give him notice of the proposed renovations to the service station, the supreme court established the principle that § 135.04 requires notice and an opportunity to cure even in situations in which a substantial change in competitive circumstances is permitted under the parties' agreement."

Id. at 942.

Techmaster's case is analogous to DSD's case. In Techmaster, the established practice of the dealership was that the dealer would sell the grantor's product under yearly "blanket purchase orders." Id. at 935. On one occasion, however, the grantor decided to do something it had never done before: to sell a particularly large order of product directly to one of the dealer's customers. Id. at 935-936. Although this was the first time the grantor had tried to do this, the grantor was still committed to keeping the ongoing blanket purchase order relationship with the dealer, with the sole exception of this single order. Id. at 936-937.

The contract in Techmaster could not have been clearer that the grantor had the right to make this type of direct sale to the dealer's customer. The contract provided, among other things, that,

> "It is expressly understood that [grantor] retains the right to aggressively pursue direct sales opportunities with prospective customers in the Territory. . . . Further, if [grantor] determines, in its sole judgment, that the needs of particular customers best would be served by direct purchases from [grantor], or if a particular customer insists on direct purchases from [grantor], [grantor] shall be entitled to make sales to such customer directly . . . . "From time-to-time, [grantor] may, as a result of Distributor's efforts, make sales of Products directly to Distributor's customers in the Territory or to [grantor's] direct sales customers within the Territory."

Id. at 934.

Nevertheless, in granting the dealer's request for injunctive relief preventing the direct sale, the Court held that "a jury could still find that defendant's decision to take over for itself the largest sale that plaintiff had ever negotiated constitutes a substantial change in the competitive circumstances, requiring defendant to give plaintiff 90 days' prior written notice and a 60-day opportunity for cure." Id. at 942.

In the instant case, there is no dispute that the competitive circumstances of the distributorship (not the distribution agreement) were such that prior to giving Java Monster to the Anheuser Busch distributors, Hansen had always given to DSD (regardless of what the contract said) 99% of all Hansen products it sold in Wisconsin, including all Monster products, and including not just soda products but also juice products such as Rumba. There is also no dispute that Hansen's decision to suddenly not authorize DSD's distribution of Java Monster constitutes a substantial change in those competitive circumstances, given Hansen's own employees' statements to DSD leading up to this decision that DSD would receive Java Monster, DSD's work over the years in developing the Monster brand name, Hansen's admission that profitability in the beverage industry is maintained and maximized by continually unveiling new product lines such as the Java Monster products, and, indeed, the explosive sales volume of Java Monster over the last several months that, but for Hansen's break from its prior practice, DSD would have received.

There is also no question that Hansen violated section 135.04's notice provision because its April 25, 2007 letter comes nowhere close to providing the required notice,

and Hansen otherwise failed to give 90 days notice prior to this change, such notice including "all the reasons for" the change plus "60 days in which to rectify any claimed deficiency." Without proper notice and adequate cure instructions, DSD was unable to rectify any claimed deficiency by, for example, making the case to Hansen that it should receive the Java Monster product rather than the Anheuser Busch distributors. DSD should have been given the opportunity to demonstrate to Hansen that it could distribute Java Monster and should be entitled to damages for that lost opportunity.

Because Hansen's decision was delivered in the context of a structural unrolling of several new Anheuser Busch distributors in Wisconsin, DSD was not given the right to distribute Java Monster. But under the WFDL, DSD should have still received 90 days notice. As the Court in Jungbluth clearly stated, "even if the dealer is without power to rectify the problem and forestall future changes in his business operations, fairness would provide him with a reasonable opportunity to arrange for the orderly accomplishment of whatever changes are to be wrought, including, if necessary, the investigation of new dealership opportunities." Jungbluth, 201 Wis.2d at 332. Accordingly, under this theory, DSD should still be entitled to damages associated with a 90-day grace period of distributing the Java Monster beverages.

Hansen gave no such notice prior to its decision to direct the Java Monster beverages to Anheuser Busch distributors. To the contrary – and one cannot help but note this fact – Hansen instead sued its Wisconsin dealers immediately before its decision on Java Monster, seeking declarations that its distributors were not dealers under the WFDL, precisely to avoid the consequences of this notice requirement. This conduct is the very type of heavy-handed grantor action that the WFDL is designed to protect against. Because Hansen gambled and lost, and the Arbitrator has found that DSD was, in fact, a dealer and entitled to such notice, Hansen violated the WFDL by failing to give such notice.

2. Hansen Violated Section 135.03 By Constructively Terminating The Dealership Agreement Without Good Cause. The Interim Award Does Not Fully Address The Pertinent Facts And Law Related To This Claim.

a. The April 25, 2007 Letter Combined With Hansen's Other Contemporaneous Actions Constituted Constructive Termination.

Although the interim award notes that the April 25, 2007 letter purported to notify DSD that the dealership agreement would remain in effect during the pendancy of the arbitration or until Hansen provided further written notice of failure to cure the alleged breaches, the interim award does not address the facts that:

(a) that letter was delivered the same day that DSD was sued in multiple forums,

(b) DSD sought in this arbitration declaratory relief of its right to terminate DSD without having to bother with such written notice,

(c) Hansen, itself, disputed earlier in that same letter that it was even obligated to provide such notice,

(d) the letter contained no explanation of how, exactly, Hansen thought DSD had breached as well as absolutely no information in the way of cure instructions,

(e) Hansen thereafter failed to respond to DSD's request for further information and cure instructions,

(f) DSD was informed by other vendors that it was "only a matter of time" before DSD would be fully replaced, and

(g) Hansen thereafter started not authorizing DSD's distribution of new products (e.g. the Java Monster products).

DSD submits that this letter, combined with all these other facts, constituted a clear intent to terminate so as to be constructive termination of the agreement.

b. The Choice To Not Authorize Java Monster Constituted Constructive Termination.

DSD also objects to the interim award's conclusion that the choice to not authorize DSD's distribution of Java Monster did not constitute constructive termination of the dealership agreement. DSD submits that Hansen's choice to not authorize DSD's distribution of Java Monster – even if permitted under the terms of the contract – still amounts to a "termination" of the dealership agreement in violation of section 135.03.

The central issue on this point is the scale of the change. If the change that is permitted by the contract simply constitutes a change – or even a substantial change – in competitive circumstances, it still does not violate that section of the statute because the statute requires substantial change in competitive circumstances of the agreement. On the other hand, if the change is so significant that it effectively drives the distributor out of business, then it rises to the level of a "termination" of the distribution agreement, and thus still violates section 135.03. In other words, there can still be "termination" of the agreement by changes technically permitted by the agreement (or changes not permitted by the agreement) if they rise to the level of driving the distributor out of business.

Section 135.03 provides:

> "No grantor, directly or through any officer, agent or employee, may ***terminate***, cancel, fail to renew ***or substantially change the competitive circumstances*** of ***a dealership agreement*** without good cause. The burden of proving good cause is on the grantor."

Wis. Stat. § 135.03 (emphasis added).

The case of Super Valu, cited by the interim award for the proposition that there can be no violation of section 135.03 based on actions permitted by the contract, is distinguishable from the situation in this case and actually supports DSD's argument on this point. There, the grantor simply wanted to open up another store, and the Court held that this action did not run afoul of section 135.03 because it was permitted by the contract, and thus did not constitute a change in the competitive circumstances of the agreement. Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis.2d 568, 570-71,

576-77 (1988) ("we do not see how the issuance of another franchise would change 'the competitive circumstances of the dealership agreement' in violation of the agreement.")

The analysis does not end there, however, as the Court took note of the fact that the grantor did not "take other action amounting to a *de facto* termination of the agreement." Id., at 576. The Court recognized, therefore, that there could still be a form of "termination" in violation of section 135.03 as the result of actions permitted by the contract, even where the grantor does not expressly terminate the contract. This is consistent with the notion of "constructive" termination.[3] More important, the Court distinguished between substantial changes in competitive circumstances of the agreement (which the Court found did not apply) versus "other actions" causing *de facto* termination of the agreement (which the Court recognized could have occurred but did not under those facts). This distinction is crucial, because it means that an agreement may be "terminated" absent express termination (either *de facto* or constructively) by "other actions" of the grantor that drive the dealer out of business, whether or not those actions constitute "substantial changes to the competitive circumstances of the agreement."

Subsequent and much more recent legal authority cited by DSD is also consistent with this reading of section 135.03. In Conrad Sentry, the Court discussed at length the concept of constructive termination under section 135.03. The Court described two arguments made by the plaintiff dealers in that case as follows:

> "[Plaintiffs] argue that changes are actionable if they result in losses to dealers that drive the dealers out of business or when they have effects that are 'substantially adverse although not lethal.' In the category of 'substantial but not lethal,' they would put losses that are material to the dealership's continued existence and that significantly diminish the dealer's viability, its ability to stay in business or its ability to maintain a reasonable profit but fall short of causing the dealership to go out of business."

[3] The Court's contemplation of *de facto* termination is analogous to the concept of "constructive" termination such that in both cases, termination is found to exist, either in fact or in law, even though no express termination has occurred. Black's Law Dictionary defines "de *facto*," in pertinent, as "Actual; existing in fact; having effect even through not formally or legally recognized." "Constructive" is defined as "Legally imputed; having an effect in law though not necessarily in fact." Bryan A. Garner (ed.), Black's Law Dictionary, 7th Ed.

Conrad Sentry, Inc. v. Supervalu, Inc., 357 F.Supp.2d 1086, 1098 (W.D. Wis. 2005). The Court then proceeded to analyze the concept of constructive termination, summarizing its characterization of Wisconsin law on this issue as follows:

> "I conclude that Wisconsin law would allow plaintiffs to proceed with claims that they were subjected to changes in their competitive circumstances that were discriminatory or that were intended as constructive termination. They may not go forward with their claim that they suffered adverse consequences that were neither discriminatory nor the *equivalent of constructive termination.*"

Although the case of Conrad Sentry did not involve changes permitted by contract, and the Court further went on to analyze the case before it under the rubric of changes that were considered substantial but not lethal (therefore requiring evidence of an actual intent to terminate rather than analyzing whether the changes constituted "the equivalent of constructive termination"), the Court's explicit recognition of the category of "lethal" changes and changes being "the equivalent of constructive termination" further supports the concept of constructive termination caused by changes so large that the dealer is forced to shut down.

In sum, the case law on this issue demonstrates that "termination" of a dealership agreement may arise under section 135.03 due to "lethal" "other actions" that effectively drive the distributor out of business, causing "constructive" or "de facto" termination. Furthermore, such termination may occur regardless of whether it is the result of changes permitted under the agreement (and thus regardless of the separate issue of whether they constitute "substantial changes in competitive circumstances of the agreement").

Here, the evidence showed that profitability is maintained in the beverage industry through the constant unveiling of new products and product lines. The evidence further showed that DSD had barely reached profitability under its current line of products, but that DSD was then denied authority to distribute the new, and hugely profitable, Monster Java product line, which (as is obvious) had a similar name to DSD's Monster products. Therefore, by its choice to not authorize the Java Monster line, Hansen constructively terminated the distributorship agreement, and thus violated section 135.03. Hansen's

constructive termination was furthered by its forcing DSD to incur substantial attorneys' fees and costs to litigate Hansen's meritless arbitration, which have driven DSD under.

C. The Final Award Should Grant DSD Its Attorneys' Fees At The Very Least, And, More Appropriate, Full Damages In Light Of These WFDL Violations.

For the reasons set forth above, DSD respectfully submits that it is the prevailing party and is entitled to its attorneys' fees. Such should be the result whether or not DSD prevails on its two damage counterclaims because DSD prevailed on the most important issues, and awarding DSD its attorneys' fees would effectuate the purpose of the WFDL.

DSD further submits, however, that upon full review of DSD's counterclaims, the final award should be adjusted to find that Hansen did violate the WFDL and, accordingly, DSD is the prevailing party for this reason as well and is entitled to additional damages for these claims.

On the notice claim, DSD is entitled to damages as the measure of profits for distributing Java Monster for 90 days. On the constructive termination claim, DSD is entitled to the lost profits of continuing the distributorship unless and until there is good cause to terminate. As previously submitted by DSD, this is the enterprise value of the dealership. While DSD objects to the exclusion of Java Monster from this calculation based on principles of waiver and estoppel, to the extent the Arbitrator finds DSD had no right to distribute Java Monster, then the enterprise value should be adjusted downward to reflect the subtraction of Java Monster.

III. CONCLUSION

It is wrong and inconsistent with the WFDL to allow the grantor to cause the dealer in this case, DSD, to incur the enormous costs associated with defending against the grantor's deliberate and extensive efforts to evade the statute. The WFDL was passed to protect dealers, not grantors. If the award becomes final in its present state, then DSD will still have been deprived of its protection as a dealer, even though it is now found to be a dealer, and Hansen will have achieved that which it set out to achieve by this

arbitration: punishing its dealer for refusing to capitulate by requiring its dealer expend enormous resources to defend its dealer status and litigate Hansen's numerous claims in California. The award will be inconsistent with, indeed violate, the clear statutory and public policy of Wisconsin. For the foregoing reasons, DSD submits that the Arbitrator may still remedy this result by finding DSD to be the prevailing party and thus entitled to attorneys' fees, and by further finding Hansen did violate the WFDL and is liable for damages.

Respectfully submitted,

DATE: MARCH 7, 2008

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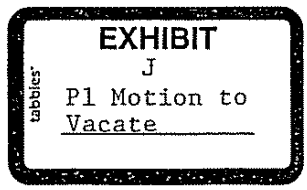
ATTORNEYS FOR RESPONDENT AND COUNTER-CLAIMANT
DSD DISTRIBUTORS, INC.

IN ARBITRATION PROCEEDINGS AT JAMS BETWEEN

HANSEN BEVERAGE COMPANY CLAIMANT AND COUNTER-RESPONDENT, VS. DSD DISTRIBUTORS, INC. RESPONDENT AND COUNTER-CLAIMANT.	JAMS REFERENCE NO. 1200039281 **DSD'S RESPONSE TO HANSEN'S OBJECTIONS AND REQUESTED CORRECTIONS TO INTERIM AWARD** HEARING DATE: MARCH 25, 2008 TIME: 9:00 A.M. PLACE: TELEPHONIC ARBITRATOR: HON. RICHARD HADEN (RET.)



In accordance with the Arbitrator's request at the March 11, 2008 telephonic hearing, DSD Distributors, Inc. ("DSD") respectfully responds to Hansen Beverage Company's ("Hansen's") Objections and Requested Corrections to Interim Award.

I. Response to Hansen's Characterization of these Interim Award Objections

Preliminarily, DSD wishes to respond to Hansen's characterization in its Objections of the appropriate scope of these objections. Hansen notes that "this opportunity for objections accords with JAMS Rule 24(j) . . . and Code of Civil Procedure § 1284 . . ." and then Hansen concludes that these objections "are necessarily, by statute and JAMS Rules, limited to errors in form, not substance." (Objections, p. 1, lns. 7-19.)

The Interim Award allowed both parties to submit, without limitation or reference to Rule 24(j), "any objections" they had to the draft award by March 7, 2008. (Interim Award, p. 16, ln. 11.) Based on the Arbitrator's comments during the March 11, 2008 teleconference that the Arbitrator views the interim award as analogous to a court's tentative ruling, and that the Arbitrator thus invites parties to submit "objections" to assist the Arbitrator in rendering the award to ensure the Arbitrator does not "miss anything," Hansen's narrow characterization of these objections appears to be a moot issue. Nevertheless, DSD further explains why Hansen's characterization is overly narrow in the likely event Hansen further raises this argument in response to DSD's objections.

First, the interim award is named "Interim Award" rather than "Final Award" and clearly states that "[i]t is not intended that this Interim Award is subject to review pursuant to Code of Civil Procedure § 1284 or § 1285, et seq." (Interim Award, p. 16, lns. 16-18.) Accordingly, by its terms, objections to this award are not confined to these statutory bases of correcting or vacating an arbitration award.

Second, JAMS Rule 24(d) and (e) allow the Arbitrator to make an interim award without limitation. While subdivision (f) suggests a procedure for requesting the Arbitrator "correct any computational, typographical or other similar error in an Award," nothing in that subdivision suggests that this standard applies to objections to interim

awards or that this is the only type of objection that an Arbitrator may invite from the parties following issuance of an interim award.

Third, Hansen's own objections surpass the correction in "form not substance" standard Hansen requires be applied (*See e.g.* Hansen objection number 4 [suggesting the award not cite a particular case for a particular proposition] and number 5 [suggesting the award articulate an additional argument raised by Hansen on a motion *in limine*, thereby necessarily changing the implied substantive grounds for the Arbitrator's ruling on that motion *in limine*]).

Fourth, and perhaps most important, as the Arbitrator has already recognized, the Arbitrator's invitation and consideration of objections beyond the scope of Hansen's narrow standard is both necessary and appropriate under the JAMS rules and applicable laws governing the conduct of arbitration, because it assists the Arbitrator in fully ruling on all claims and issues that have been submitted and are necessary for a full and final resolution of the parties' dispute. JAMS rule 24(h) clearly provides that "The Award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim, and the relief, if any, as to each claim. (Emphasis added)

Under Wisconsin law, the function of the arbitrator is to ensure that the parties receive the arbitration they bargained for. Milwaukee Professional Firefighters, Local 215 v. City of Milwaukee, 253 N.W.2d 481 (Wis.1977). When the arbitrator fails to confine himself to the parties' agreement, the arbitrator has exceeded his powers. Id. In addition, by way of reference but without conceding that California law governs in this matter, under California law, arbitrators are required to decide all questions submitted that are "necessary" to determine the controversy. Cal. Code Civ. Proc. § 1283.4. Courts hold that an arbitrator's failure to do so may be grounds to vacate under California Code of Civil Procedure section 1286.2(a)(5) as constituting "other conduct of the arbitrators contrary to the provisions of this title." *See e.g.* Herman Feil, Inc. v. Design Center of Los Angeles, 204 Cal.App.3d 1406, 1418 (1988). Likewise, under the Federal Arbitration Act, an arbitrator's failure to rule upon certain submitted claims and issues

may constitute grounds for vacating the award such that a "mutual, final, and definite award upon the subject matter submitted was not made." *See* Title 9, U.S.C. § 10; Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 176 (2nd Cir. 1998).

Here, as pointed out in DSD's objections, the Arbitrator does not appear to have ruled upon DSD's counterclaim for a violation of the WFDL's notice provision (Wis. Stat. § 135.04) and does not appear to have fully addressed clearly applicable case law and relevant facts related to DSD's counterclaim for a violation of the WFDL's good cause termination provision (Wis. Stat. § 135.03). The Final Award should address both of these counterclaims, at which point it would be further appropriate for the Arbitrator to revisit the secondary issue of "prevailing party" status for the purpose of awarding attorney's fees and costs.

During the March 11, 2008 teleconference, Hansen asserted that California cases hold an arbitrator's consideration of such objections would be grounds for vacating the award. There is no such authority. Because this arbitration is being conducted under the jurisdiction of the Wisconsin courts, California cases on motions to vacate arbitration awards are not relevant. Wisconsin law *requires* the parties to submit potential grounds for a motion to vacate to the arbitrator for consideration. DePue v. Mastermold, Inc., 468 N.W.2d 750, 753 and at n.6 (Wis.App.1991) ("We hold that a party cannot complain to the courts that the arbitrator acted outside the scope of his or her authority if the objection was not first raised before the arbitrator[;]" and further noting, "We recognize that there may be situations where a claim that the arbitrator exceeded his or her jurisdiction may not arise until the arbitrator's award is made."). Moreover, and without conceding that California law would govern an appeal of this matter, even California law does not support Hansen's assertion. Although DSD is not aware of what Hansen was referencing during the March 11 call, the closest case that DSD was able to find on this issue is the case of Pacific Crown Distributors v. Brotherhood of Teamsters and Auto Truck Drivers, 183 Cal.App.3d 1138 (1986), where the court held an award could be vacated because an

issue decided upon was one submitted in a post-hearing brief which the parties had expressly agreed before the arbitration would not be submitted to arbitration and on which no evidence was thus presented in arbitration. Here, in contrast, DSD's objections relate to claims that were part of DSD's submitted counterclaims, no such exclusion was agreed upon (that the Arbitrator invited post-hearing briefing for "clarification" on certain different and specific issues does not mean DSD forfeited a ruling on its counterclaims), and all evidence pertinent to these counterclaims was presented in the arbitration. Indeed, the arbitration provision in the parties' contract is broad, requiring arbitration of "any dispute, controversy or claim arising out of or relating to this Agreement or the breach or termination hereof."

The fifth and final reason why DSD should be permitted to again raise its claims in the context of this objection, and why DSD's counterclaims should ultimately prevail, is that Hansen, itself, did not provide proper notice of its own affirmative defenses to DSD's counterclaims, in violation of the JAMS rules. JAMS rule 9(d) provides:

> "Any Party that is a recipient of a counterclaim may reply to such counterclaim, including asserting jurisdictional challenges. In such case, the reply must be served on the other Parties and filed with JAMS within fourteen (14) calendar days of having received the notice of counterclaim. ***No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of prior notice to the other Parties***, unless all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice. (Emphasis added.)

Hansen never filed or served an answer to DSD's counterclaims, and only raised its affirmative defense – that it had not terminated the dealership agreement and further intended to honor its terms in the event DSD is determined to be a WFDL dealer – for the first time in opening argument at the arbitration hearing. Rule 9(d) specifically prohibits the introduction of claims, remedies and affirmative defenses at the

arbitration hearing. The reason for the rule is obvious. Without notice of all claims and defenses ***before*** the hearing, the parties are effectively shut out of the arbitration process and, therefore, do not receive what they contracted for – a full and fair opportunity to present their case. Hansen's eleventh hour affirmative defense was, by their admission, only raised at the hearing after it appeared at the hearing that the evidence favored the conclusion that DSD is a statutory dealer. Not only does Hansen's last minute defense violate Wisconsin law, it was allowed in violation of JAMS Rule 9 and, as a result, in violation of the parties' agreement.

For the foregoing reasons, Hansen's characterization of the scope of these objections is overly narrow, and the Arbitrator should fully consider DSD's objections so as to make any appropriate adjustments in the final award.

II. DSD's Response to Hansen's Specific Objections

A. Response to Hansen's Objection (1)

DSD does not object to Hansen's objection number (1). Hansen correctly points out that DSD's counterclaims were asserted in its September 11, 2007 Amended Answer, Affirmative Defenses and Counterclaims, and, for the reasons set forth in DSD's own objections and this response, DSD requests a full ruling on those counterclaims.

B. Response to Hansen's Objection (2)

DSD does not object to Hansen's proposed clarification, as Hansen appears to be concerned with clarifying that the Arbitrator's finding that DSD is a dealer under the WFDL does not necessarily mean all of Hansen's beverage distributors in Wisconsin are "dealers" pursuant to the WFDL.

C. Response to Hansen's Objection (3)

DSD does not object to Hansen's objection, as Hansen appears to have supplied the proper citation.

D. Response to Hansen's Objection (4)

DSD does not dispute Hansen's objection. For the convenience of the Arbitrator, the provision of the Frieburg case that appears to support the accurate statement of law

stated in the interim award is the following:

> "Our cases have distilled the principles underlying the Wisconsin cases, and provide that a community of interest may exist under one of two circumstances: first, when a large proportion of an alleged dealer's revenues are derived from the dealership, and second, when the alleged dealer has made sizeable investments (in, for example, fixed assets, inventory, advertising, training) specialized in some way to the grantor's goods or services, and hence not fully recoverable upon termination."

Freiburg Farm Equipment, Inc. v. Van Dale, Inc., 978 F.2d 395, 399 (7th Cir. 1992) (citing Lakefield Tel. Co. v. Northern Telecom, Inc., 970 F.2d 386, 1992 U.S. App. LEXIS 18169, slip op. at 8 (7th Cir. Aug. 7, 1992); Kenosha Liquor Co. v. Heublein, Inc., 895 F.2d 418, 419 (7th Cir. 1990); Moodie v. School Book Fairs, Inc., 889 F.2d 739, 744 (7th Cir. 1989); Fleet Wholesale Supply Co., Inc. v. Remington Arms Co., Inc., 846 F.2d 1095, 1097 (7th Cir. 1988), Moore v. Tandy Corp., 819 F.2d 820, 822 (7th Cir. 1987), and further noting that "We also suppose that some combination of revenues and investments could manifest a community of interest, even if neither could standing alone[,]" citing Zeigler Company, Inc. v. Rexnord, Inc., 407 N.W.2d. 873, 879-82 (Wis. 1987); Kealey Pharmacy & Home Care Servs., Inc. v. Walgreen Co., 761 F.2d 345, 349-50 (7th Cir. 1985)).

E. Response to Hansen's Objection (5)

DSD does object to Hansen's proposed insertion of the additional grounds asserted by Hansen at the last minute in opposition to DSD's motion *in limine* to exclude evidence of OTT/WWG. The insertion is unnecessary to the award, is unrelated to any substantive objection, and such insertion may imply a finding by the Arbitrator that exceeds the scope of the ruling on the motion.

DSD sought to exclude evidence of these other entities because the WFDL's dealership analysis only applies to the corporate and contractual signatory entity, rather

than a collection of corporate entities, some of which are not signatories to the dealership contract. (*See* DSD's Motion in Limine to Exclude Evidence of OTT and WWG). Hansen filed an opposition to this motion asserting that a dealer can be a "joint venture" or an "other entity" and that DSD, OTT, and WWG collectively satisfy the tests for these things. (*See* Hansen's Opposition to Motion in Limine Seeking to Exclude Evidence of Ott Schweitzer and Wisconsin Wetgoods). Hansen's opposition was flawed, first because Hansen did not address the argument that the dealership analysis is confined to the contractual signatory part. It was further flawed because, contrary to Hansen's assertion in its opposition, Hansen would not have actually been able to show that these three entities meet the requirements for either a joint venture or "other entity" sufficient to allow evidence of these other entities to come in under the WFDL's dealership analysis. Hansen did not offer any evidence to support its argument that DSD, OTT and WWG were a joint venture or other combined WFDL entity. In fact, uncontroverted testimony received at the hearing proved that DSD, OTT and WWG were not, and could not be, a joint venture or other combined statutory entity. (*See* Rough Transcript, v. 4, pp. 86-91; Interim Award, p. 11, lns. 4-11.)

At the arbitration hearing, the Arbitrator denied DSD's motion *in limine*, noting simply that it would be unfair to exclude evidence that the arbitrator had previously stated would be allowed; however, the Arbitrator did not address the parties' specific arguments on whether the dealership analysis may apply to non-corporate and non-signatory entities. In the interim award, the Arbitrator noted that the motion *in limine* was denied because such evidence was "potentially material." The ultimate issue of dealership status under the WFDL was decided against Hansen; therefore, a finding that Hansen argued to the contrary is not material to the final decision.

DSD respectfully suggests that, in the event the final award includes Hansen's proposed addition on this point, the final award specify that it does not rule one way or the other on whether evidence of separate corporate, non-signatory entities like WWG and OTT is technically relevant under the WFDL's dealership analysis.

CONCLUSION

In response to Hansen's assertion that the scope of objections to the Interim Award was limited to technical objections, DSD responds that the scope of objections to the Interim Award is not limited by JAMS rules, by Wisconsin law or by California law. Wisconsin law in fact requires that objections be made during the pendency of the arbitration or they will not be considered on appeal. In this case, DSD has asked, pursuant to JAMS Rule 24(h) and Wisconsin law, that the Arbitrator rule in favor of DSD on its first counterclaim. DSD has also asked that the Arbitrator enforce JAMS Rule 9(d) to disallow all testimony and argument on Hansen's affirmative defense of "no termination" raised at the hearing on this matter and adjust his conclusions as to DSD's second counterclaim accordingly. Finally, DSD has asked that the Arbitrator award to it its attorney's fees and costs as the prevailing party on every claim submitted to arbitration. Conclusions to the contrary would be made in manifest disregard of the parties' contract and the Wisconsin Fair Dealership Law and would violate the public policy of the State of Wisconsin as set out in the Wisconsin Fair Dealership Law.

Respectfully submitted,

DATE: MARCH 21, 2008

NOWLAN & MOUAT LLP
JULIE LEWIS

By: _____
JULIE LEWIS

DATE: MARCH 21, 2008

FOLEY & LARDNER LLP
LEILA NOURANI
MICHAEL B. MCCOLLUM

By: _____
LEILA NOURANI
MICHAEL B. MCCOLLUM

PROOF OF SERVICE

I am employed in the **County of, State of California.** I am over the age of 18 and not a party to this action; my current business address is **555 South Flower Street, Suite 3500, Los Angeles, CA 90071-2411.**

On **March 21, 2008,** I served the foregoing document(s) described as:

DSD'S RESPONSE TO HANSEN'S OBJECTIONS AND REQUESTED CORRECTIONS TO INTERIM AWARD

on the interested parties in this action as follows:

X BY THE FOLLOWING MEANS:
X I placed a true copy thereof enclosed in sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

X **BY MAIL**

__ I placed the envelope(s) with postage thereon fully prepaid in the United States mail, at **Los Angeles, California.**

X I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service; the firm deposits the collected correspondence with the United States Postal Service that same day, in the ordinary course of business, with postage thereon fully prepaid, at **Los Angeles, California.** I placed the envelope(s) for collection and mailing on the above date following ordinary business practices.

X **BY E-MAIL**
X See email addresses on Service List

X Executed on **March 21, 2008,** at **Los Angeles, California.**

__ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

X I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Sandra Franck
Sandra Franck

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Attorneys for Hansen Beverage Company

JAMS ARBITRATION

HANSEN BEVERAGE COMPANY, a California corporation,

Claimant,

v.

DSD DISTRIBUTORS, INC., a Wisconsin corporation,

Respondent.

JAMS Reference No. 1200039281
Arbitrator: Hon. Richard Haden (Ret.)

HANSEN BEVERAGE COMPANY'S OBJECTIONS AND REQUESTED CORRECTIONS TO INTERIM AWARD

Demand Filed: April 25, 2007
Hearing Dates: January 22-25, 2008
Interim Award: February 21, 2008[1]

[1] Transmitted to the parties on February 27, 2008.

EXHIBIT
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I
PROCEDURAL BACKGROUND

On February 27, 2008, JAMS transmitted to the parties via facsimile and U.S. mail the Arbitrator's Interim Award dated February 21, 2008 (the "Interim Award"). The Interim Award provides, *inter alia*, "Both parties may file any objections to the Interim Award by March 7, 2008." Interim Award, 16:11-14.

This opportunity for objections accords with JAMS Rule 24(j) ("Within seven (7) calendar days after issuance of the Award, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award") and Code of Civil Procedure § 1284 ("The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) ["There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award."] and (c) ["The award is imperfect in a matter of form, not affecting the merits of the controversy."] of Section 1286.6 not later than 30 days after service of a signed copy of the award on the applicant. Application for such correction shall be made not later than 10 days after service of a signed copy of the award on the applicant.")

Accordingly, Hansen submits the following objections/requests for correction which are necessarily, by statute and JAMS Rules, limited to errors in form, not substance.

II
OBJECTIONS AND REQUESTED CORRECTIONS

Hansen makes the following objections and requests the following corrections to the Interim Award (deletions are indicated by ~~strike-through~~, and insertions are reflected in bold and italics):

(1) "The claims are stated in the Demand for Arbitration dated April 25, 2007, ~~and~~ the response dated June 8, 2007, ***and the Amended Answer, Affirmative Defenses and Counterclaims dated September 11, 2007.***" Interim Award, 3:8-9.

Basis for objection/correction: DSD Distributors, Inc.'s "Response to Demand for Arbitration/General Denial" dated June 8, 2007 consisted of a general denial; it did not assert any affirmative defenses or counterclaims. DSD subsequently amended and supplemented its initial "Response," and asserted its affirmative defenses and affirmative counter-claims in its September 11, 2007 "Amended Answer, Affirmative Defenses and Counterclaims."

(2) "Hansen CEO Rodney Sacks personally approves all ~~dealerships~~ ***distributorships***." Interim Award, 5:25-26.

Basis for objection/correction: The characterization of all of Hansen's distribution relationships as dealerships is inaccurate and not supported by any evidence. Though Hansen disagrees with the Arbitrator's finding that DSD Distributors, Inc., in particular, qualifies as a "dealer" under Wisconsin law, Hansen accepts this finding and thus the characterization of the DSD relationship as a dealership. However, no evidence was presented to show that any of Hansen's other nationwide distributors is a dealership, or even that any "dealership" law applies to those distributors. As evidenced by Exhibits 4, 5, and 8, Hansen's standard agreement is entitled, "Distribution Agreement." The requested correction does not result in any substantive change to the Interim Award, since the award concerns only Hansen's relationship with DSD.

(3) "The 2006 target was 38,145 cases with 25,786 sold. (Exh. 33, ~~25~~, ***35***)." Interim Award, 7:6-7.

Bases for objection/correction: This appears to be an inadvertent mis-citation to the record. Exhibit 25 is DSD's 2005 tax return; it does not contain case sales data. Rather, Exhibit 35, which is the 2005/2006 Business Review and Planning Commitments, includes the 2006 case sales target data.

(4) "A community of interest may exist under one of two circumstances: first, when a large proportion of an alleged dealer's revenues are derived from the dealership; and second, when the alleged dealer has made sizeable investments specialized in some way to the grantor's

products and therefore not fully recoverable upon termination. ~~Ziegler, quoting Kayser Ford, Inc. v. Northern Rebuilders, Inc., 760 F.Supp. 749 (W.D. Wisc. 1991).~~" Interim Award, 10:4-10.

Basis for correction: The *Ziegler* court did not make this pronouncement; this language is not contained in the *Ziegler* opinion. Nor could the *Ziegler* court, which decided that case in 1987, have quoted from *Kayser Ford*, which was not decided until 1991. Hansen believes the Arbitrator may have intended to cite to *Freiburg Farm Equipment, Inc. v. Van Dale, Inc.*, 978 F.2d 395 (7th Cir. 1992), a case DSD heavily relied upon in its briefing. However, the *Freiburg* decision also does not quote or cite to the *Kayser Ford* decision.

(5) "Hansen, however, argues DSD is merely a small part of Ott/WWG, which is its parent. Hansen urges consideration of DSD's 'parent' companies in deciding community of interest since failure to do so amounts to a 'carving up' of the parent's business which courts interpreting the WFDL have rejected. ***Hansen also urges consideration of the Ott/WWG/DSD operation as a 'joint venture' or 'other entity,' pointing out that the WFDL defines a 'person' who may be a 'grantee' of a dealership to include a 'joint venture or other entity,' and that such definitions include two or more separate corporations.***" Interim Award, 10:21-11:11; 12:19-20

Basis for correction: The Arbitrator denied DSD's motion to exclude evidence about Ott and WWG "because such evidence is potentially relevant to the dealership issue." Interim Award, 3:23-25. In its opposition to DSD's motion to exclude, Hansen argued, *inter alia*, that the Arbitrator may and should consider the Ott/WWG/DSD operation to be a "joint venture" or "other entity" within the meaning of the WFDL and Wisconsin law. See Hansen's Opposition to Motion in Limine Seeking to Exclude Evidence of Ott Schweitzer and Wisconsin Wetgoods. Even though, as the Arbitrator found, "DSD is a separate corporate entity" from Ott and WWG (Interim Award, 11:4-7 and 12:19-20), Hansen argued

that DSD may ***still***, nevertheless, be part of a "joint venture" and/or "other entity" in conjunction with Ott and WWG, and thus consideration of the ***joint*** operations is appropriate in determining whether a community of interest exists under the WFDL. The Award should recite Hansen's position that, even if DSD is a stand-alone company, that finding does not preclude consideration of Ott and WWG in answering the community of interest question.

III
RESERVATION OF RIGHTS

Hansen does not request an oral hearing prior to submission of the matter for final decision, but does not waive and expressly reserves its right to present argument in the event DSD requests such a hearing. Hansen further requests an opportunity to respond in writing to any objections to the Interim Award asserted by DSD. See JAMS Rule 24(j) ("any Party may serve . . . a request that the Arbitrator correct any . . . error . . . . A Party opposing such correction shall have seven (7) calendar days in which to file any objection.")

DATED: March 7, 2008

Respectfully submitted,

SOLOMON WARD SEIDENWURM & SMITH, LLP

By: _____
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TANYA M. SCHIERLING
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ARBITRATOR

IN THE MATTER OF THE ARBITRATION

BETWEEN

HANSEN BEVERAGE COMPANY,

Claimant,

and

DSD DISTRIBUTORS,

Respondent.

JAMS Ref. No.: 1200039281

FINAL AWARD

1. Parties and Counsel:

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EXHIBIT
L
P1 Motion to Vacate

2. Arbitrator:

Hon. J. Richard Haden (Ret.)
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Place of Arbitration: San Diego, California

Date of Interim Award: February 21, 2008

The undersigned Arbitrator, having been selected by stipulation of the parties, and having been duly sworn and examined the submissions, proof and allegations of the parties, finds, concludes, and issues this Final Award as follows:

I. INTRODUCTION AND PROCEDURAL STATEMENT

Claimant Hansen entered into a distributorship agreement with Respondent DSD Distributors to distribute "Monster" energy drinks in a territory within Wisconsin. After several years Hansen sought to revoke the agreement. DSD has invoked the Wisconsin Fair Dealership Law (WFDL) initially seeking to prevent revocation under the agreement's terms and later seeking damages, claiming Hansen has constructively terminated the agreement. Hansen filed this Demand for Arbitration seeking a determination the WFDL does not apply because DSD is not a dealer as defined by that law and that Hansen is entitled to terminate DSD as a

distributor pursuant to their contract. Further, since Hansen claims it has not constructively terminated the agreement, DSD is not entitled to distribute "Java Monster" because it is a milk and coffee based beverage, not a soda based beverage like the other "Monster" products DSD has distributed. Each side seeks attorney fees.

The arbitration clause is contained in the Distribution Agreement paragraph 19 dated December 1, 2004. The arbitration is pursuant to the stipulation of the parties. The claims are stated in the Demand for Arbitration dated April 25, 2007, the response dated June 8, 2007, and the Amended Answer, Affirmative Defenses and Counterclaims dated September 11, 2007. The claims are arbitrable. However, DSD is participating under reservation of rights.

The substantive law of California and the California Arbitration Act together with the Federal Arbitration Act and the JAMS Comprehensive Rules shall apply in this proceeding unless the parties otherwise agree in writing. The WFDL has also been considered where applicable.

Hansen's motions for Summary Disposition were heard and denied December 17, 2007. A separate decision on that motion is contained in the file.

Hansen's *in limine* motion to exclude late produced documents was denied because the documents were produced as soon as they became available. DSD's motion to exclude the expert testimony of Ross Colbert was denied without prejudice subject to specific evidentiary objections to individual questions. DSD's motion to exclude evidence about Ott Schweitzer and Wisconsin Wet Goods (hereinafter Ott/WWG) was denied because such evidence is potentially relevant to the dealership issue.

The evidentiary hearing took place January 22-25, 2008, in the JAMS offices, 401 "B" Street, Suite 2100, San Diego, California. Hansen

presented the testimony of Raymond LaRue, Raymond Mehringer, Ross Colbert, Rodney Sacks, and Tom Barnes. DSD presented the testimony of Steven Bysted, John Johnson, Daniel Braun, Andrew Christon, and Carl Scharenbroch. The hearing was reported.

At the conclusion of the testimony the matter was argued. Counsel further submitted post hearing briefs and the matter was submitted February 20, 2008. Following the filing of the February 21, 2008 Interim Award, additional briefing was received and the matter was argued March 25, 2008.

II. FACTS

The following is a statement of those facts found by the Arbitrator to be true and necessary to the Award. To the extent that this recitation differs from any party's position, that is the result of determinations as to credibility and relevance, burden of proof, and the weighing of evidence.

"Monster" is Hansen's brand of new age enhanced energy drink which was introduced in April 2002 in various flavors. Doug Sheridan, an owner in Ott/WWG, first tasted the product at a trade show in Las Vegas. In early January 2004 Mr. Sheridan and his business associates Steve Bysted and Daniel Braun met with Hansen representatives Ray Mehringer and Ray LaRue to establish a "Monster" distributorship for Ott/WWG. Hansen selected Ott/WWG to distribute "Monster" in this particular part of Wisconsin because Ott/WWG was an established business with an existing account base that could provide an immediate market impact for "Monster." The Hansen representatives were favorably impressed by the Ott/WWG enterprise they observed. Hansen would not have entered into a distributorship with a start-up company because of the high risk of failure with start ups. Ott/WWG has successfully distributed Miller Beer and some other products for many years. Hansen already had a distributorship

agreement in this territory with Cadbury for a number of its other products.

The initial distributorship agreements are with Hansen and both Ott and WWG. Both are dated January 16, 2004, and both are signed by Steve Bysted as president of both Ott and WWG (Exh. 4-5). The distributor acknowledges in both contracts it has no right to distribute any Hansen products other than those identified in Exhibit A. That exhibit lists only three products. Any sales of additional products not listed shall not constitute an express or implied additional distributorship agreement (Exh. 4 ¶2(c), 5 ¶2(c)). The contracts also set out the territory and types of accounts (Exh. 4 and 5, Exh. B and C).

In late 2004 Ott/WWG owners discussed establishing a new division or entity to focus on nonalcoholic products including Hansen, Gray's and Sprecher's Sodas and "Crush". They projected "Crush" products would account for two-thirds of all sales revenue of the new company. There had been some problems presented for Ott/WWG in servicing the stores not licensed for alcoholic beverages with soda products because the deliveries were usually in beer trucks. Further, some promotional incentives in soft drink sales are illegal in the highly regulated Wisconsin beer industry. Steve Bysted told Ray Mehringer at Hansen the only way to sell non-licensed (non alcohol) accounts was to start a new company because "beer guys don't sell well to non-licensed accounts." Mr. Mehringer replied, "You have to do what you have to do because that's where the market is heading."

Hansen understood the new entity would have the same ownership as Ott/WWG. Ray Mehringer thought it was a "great idea" because it would place more focus on Hansen brands. He thought the new entity was basically a part of Ott/WWG. Hansen CEO Rodney Sacks personally

approves all distributorships. He would never approve a start-up company as a distributor and understood from his employees DSD was merely Ott/WWG owners rearranging their own corporate structure within their group. Hence, he did not require normal distributorship approval procedures for DSD. For him, DSD was the same as Ott/WWG. In fact, the payment history shows both Ott/WWG and DSD listed as the same account (Exh. 93). The DSD distributor set-up request states Ott/WWG have formed an NA (non alcoholic) division named DSD (Exh. 63). Ray Mehringer informed others at Hansen in November 2004 "DSD Distributors have taken over for Ott/WWG. DSD is a newly formed company by the same officers as the companies named above. DSD was formed to put total commitment to the Hansen's Beverage Line...." (Exh. 30) Ray Mehringer considered this to be a "flawless transition."

In fact, DSD[1] was formed by Doug Sheridan, Steve Bysted and Daniel Braun as a separate stand alone corporation with separate tax identification and returns, separate books, bank accounts and loans, and separate employees with separate employment and withholding tax identification numbers. The three partners each contributed $25,000 to the new entity and arranged for a $200,000 bank loan and a $300,000 line of credit. The loans are personally guaranteed by the three owners. DSD purchased four vehicles and ultimately hired four new employees. One vehicle is decorated with the "Monster" logo and employees wear "Monster" polo shirts. It subleases space in the Ott/WWG warehouse which is owned by B&S Real Estate which is owned by Steve Bysted and Doug Sheridan (Exh. 21). Prior to January 2006 when all three companies moved to this new warehouse, DSD paid no rent. DSD pays Ott/WWG a management fee

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[1] DSD is the first letter of each of the owners' first names.

for bookkeeping, management, and other office expenses. This fee began at $4,700 per month and was reduced in 2007 (Exh. 22). On December 1, 2004, Hansen and DSD entered into a distribution agreement which is essentially the same as Hansen's previous agreements with Ott and WWG except the product list is expanded from three to eight (Exh. 8, Exh. A).

Hansen representatives met with DSD annually to review sales and plan for the following year. DSD understood these were goals and not sales quotas. The 2005 target or projected sales were 25,250 cases and actual sales were 20,288 cases (Exh. 61, 33). The 2006 target was 38,145 cases with 25,786 sold (Exh. 33, 35). The 2007 target was 37,805 cases with 32,470 cases sold (Exh. 9, 134, stipulation). The goals were based in part on sales outside the territory which DSD made at Hansen's request. When Hansen asked DSD to stop selling outside its territory, the goals were not reduced accordingly. While Mr. LaRue testified this performance was poor, he acknowledged no one at Hansen ever expressed this view to DSD at the time. In fact, Hansen had said John Johnson of DSD "does a great job" (Exh. 36) and Ray Mehringer was always satisfied with DSD's performance. He considered them fully committed to selling Hansen products and believed they fully complied with the distributorship agreement. He never told anyone at DSD they were unsatisfactory. Hansen referred to its relationship with DSD as "long term" (Exh. 104) and thanked DSD for the "tremendous support" it had shown Monster (Exh. 116).

When Ray Mehringer observed "Liquid Ice," a competing energy drink, in a DSD truck he told DSD they were not to distribute competing energy drinks. DSD had been distributing "Liquid Ice" to a few Gentlemen's Clubs but transferred that contract to Ott/WWG. Hansen did not actually have a similar blue raspberry product.

On April 25, 2007, counsel for Hansen served DSD with notice

of what it considered to be seven breaches of the distributorship agreement with sixty days to cure. If the breaches were not cured, Hansen stated it intended to terminate the agreement for good cause (Exh. 31). Hansen also filed a simultaneous demand for arbitration (Exh. 32). Hansen products represent 65% of DSD sales. The "Crush" brand DSD attempted to distribute has been unsuccessful. Without Hansen, DSD will be forced to close.

In May 2007, Hansen launched "Java Monster," a coffee based product. Unlike the soda "Monster" products, "Java Monster" contains coffee, milk, and cream which is cooked under pressure in the can. Hansen does not believe it is an extension of the "Monster" soda products. It is intended to compete with other coffee drinks and must be displayed separately from "Monster" soda beverages or Hansen feels it will be "cannibalizing" its product or competing with itself. Hence, Hansen has determined "Java Monster" requires a separate route to market. Although Hansen initially indicated DSD would distribute "Java Monster" (Exh. 40, 42,) it ultimately gave the distributorship to Anheuser Busch.

DSD estimates the ability to distribute "Java Monster" would increase its Hansen sales 100% and enable DSD to hire an additional employee. Its inability to sell "Java Monster" has had a negative impact on its sales. Moreover, the separate "Java Monster" distributor conflicts with DSD "Monster" sales because stores expect all "Monster" to be placed on the same shelf. DSD observes "Java Monster" on shelves designated and paid for by DSD for its "Monster" soda products and in coolers DSD has purchased. Thus, the "Java Monster" distributor enjoys the distribution benefits created and paid for by DSD.

On July 20, 2007, DSD sued Hansen in Wisconsin state court seeking declaratory and injunctive relief (Exh. 88). Were DSD to lose its

Hansen distributorship, its total liabilities would be $705,000. By liquidating assets, the shortfall would be approximately $500,000. Hansen has continued to honor all DSD product orders during the pendency of this dispute.

II. ANALYSIS

Based on the facts identified above and additional facts relevant to the analysis, DSD is a dealer within the meaning of the WFDL. Hence, Hansen may not terminate the Distributorship Agreement without good cause. Hansen has failed to demonstrate good cause. Even though DSD is a dealer under the WFDL, DSD is not entitled to distribute "Java Monster" because it is a milk and coffee based product not contemplated by the clear terms of the Distributorship Agreement. Further, Hansen has not constructively terminated DSD because it has preserved the status quo during the pendency of this arbitration. DSD is not entitled to any damages. Because each party has prevailed in part, neither is entitled to attorney fees and costs.

A. DSD is a Dealer Within the Meaning of the WFDL.

The Distributorship Agreement calls for the application of California law. However, if Respondent is a "dealer" as defined by the WFDL, the WFDL will govern to the extent it conflicts with California law. The WFDL would impact distributorship termination and may affect the liquidated damages provision of the agreement.

The WFDL shields Wisconsin dealers from unfair treatment by grantors who inherently possess superior economic power in the dealership negotiation. A dealership requires a community of interest between the dealer and grantor. Ziegler Co. v. Rexnord, Inc. (1987) 139 Wis.2d 593, the seminal case on community of interest, sets out a ten part test for the existence of a community of interest. These include length of relationship;

obligations; percentage of time and revenue grantee devotes to the agreement; percentage of gross profits grantee derives from the agreement; extent of territory; use of commercial symbols; grantee's financial investment; personnel; advertising; and supplemental services provided by the grantee. The full spectrum of a party's relationship must be examined to determine if a community of interest exists. (See also The Wisconsin Fair Dealership Law, Third Ed. §4.25.) A community of interest may exist under one of two circumstances: first, when a large proportion of an alleged dealer's revenues are derived from the dealership; and second, when the alleged dealer has made sizeable investments specialized in some way to the grantor's products and therefore not fully recoverable upon termination. Some combination of revenues and investments can manifest a community of interest, even if neither could standing alone. Freiberg Farm Equipment, Inc. v. Van Dale, Inc., 978 F.2d 395, 399 (1992).

Here, it is clear that while DSD originally expected "Crush" would be its most significant product, with estimated first year sales of $235,000 compared to estimated "Monster" sales of $58,000, those projections never materialized and "Monster" represents 65% of DSD sales (Exh. 131). This is a large proportion of DSD's revenues. Three DSD employees spend 70-80% of their time and one spends 5-10% of his time on Hansen brands. This represents the bulk of what DSD's employees do. DSD partners have testified DSD will fold without Hansen. There exists no replacement or substitute product available to DSD. There can be no more severe economic consequence for DSD than losing Hansen because DSD is clearly dependent upon Hansen for its livelihood.

Hansen, however, argues DSD is merely a small part of Ott/WWG, which is its parent. Hansen urges consideration of DSD's "parent" companies in deciding community of interest since failure to do so amounts

to a "carving up" of the parent's business which courts interpreting the WFDL have rejected. Hansen also argues Ott/WWG/DSD is a joint venture which under the WFDL may include two or more separate corporations. Specifically, while Hansen products represent 65% of DSD's revenue, they amount to merely 1% of the combined parent revenue. Moreover, there is an absence here of "sunk costs" or DSD investments tailored specifically to Hansen. DSD replies that it is in fact a separate corporate entity in a community of interest with Hansen. Further, DSD argues it has made extensive sunk costs, hired personnel, and advertised all specifically for its Hansen business.

The facts demonstrate DSD is a separate corporate entity which maintains separate tax identification and returns, separate books, bank accounts, and loans and separate employees with separate employment and withholding tax identification numbers. Although the three DSD partners are also owners of Ott/WWG, they separately capitalized DSD and personally guaranteed loans. DSD is not a joint venture with Ott/WWG because those entities do not satisfy the requisites for a joint venture. Ott/WWG has other owners who did not participate in DSD; there is no evidence of mutual control or an agreement to share profits; and there is no contract establishing such a relationship. Ott/WWG has not signed the Distributorship Agreement at issue here. Edlebeck v. Hooten, 20 Wis.2d 83 (1963). Were DSD merely a division of Ott/WWG, of course, the results would be different because Ott/WWG is a much larger entity distributing predominately beer.

DSD argues its regular business operating expenses of rent, salaries, and interest qualify as financial investments in inventory, facilities, and goodwill. Hansen points out DSD has made little if any "sunk costs" because it rents space and management services from Ott/WWG, those

costs have been adjusted downward to reflect DSD's performance, DSD did not pay for lease space until Ott/WWG moved into a new larger warehouse owned by a company which is owned by two of DSD's partners, and neither the warehouse nor the vehicles are use specific to Hansen products. There is no "Monster" logo on the warehouse. In fact, the lease and management fees simply stop if DSD ceases to function and one vehicle has a "Monster" decal on it which is removable. The inventory may be resold to Hansen under the terms of the Distributorship Agreement and Hansen has spent several hundred million dollars itself building the "Monster" brand. DSD's tax returns do show advertising expenses in 2004 of $84, in 2005 of $2,768, and in 2006 of $1,830 (Exh. 47-49). DSD does use "Monster" logo polo shirts, stationery, and point of sale banners and signs. As mentioned, one of four DSD vehicles has a removable "Monster" decal.

According to hearsay from a bookkeeper, Deborah Agate, who was not a witness, DSD also spent $85,163 on all promotional matters. However, these "expenditures" were actually price reductions to customers or "slotting fees" to achieve optimum product placement which likely yielded greater sales revenue for DSD. DSD president Steven Bysted testified most of the $500,000 line of credit and loans has paid for inventory, salaries, promotions, and attorney fees.

Beloit Beverage v. Winterbrook, 900 F.Supp. 1097 (E.D. Wisc 1995), considered and rejected the argument that expenses like those of DSD's amount to "sunk costs." The alleged dealer in Beloit, a beverage distributor, argued its leased warehouse space should qualify as "sunk" costs for WFDL purposes. The court disagreed, finding nothing in a warehouse that is use specific. The warehouse could be used to store other product. Here, WWG/Ott will likely use the approximately 10% of warehouse space DSD uses to store more Miller beer or rent it for some

other purpose should DSD no longer require it. Further, because the space is merely leased – a sweetheart lease at that – and not owned, it cannot be considered a "sunk" cost.

While DSD may not have demonstrated adequate "sunk costs," DSD has shown it is separate from Ott/WWG. Hansen represents 65% of DSD's revenue, there is no available substitute product for "Monster," and DSD will cease to exist without its Hansen distributorship. Hansen has DSD "over a barrel." This is exactly the predicament the WFDL is designed to prevent. Therefore, considering the totality of the circumstances, DSD is a dealer as contemplated by the WFDL and Hansen may not terminate the distributorship without good cause.

B. There Exists No Good Cause for Termination.

In its April 25, 2007, letter to DSD, Hansen alleged DSD breached the Distributorship Agreement in seven ways (Exh. 31). Hansen demonstrated at the hearing it had not terminated DSD and would not do so if the Arbitrator found DSD was a dealer within the WFDL. DSD objects to Hansen's position, characterizing it an "affirmative defense" asserted without proper notice in violation of JAMS Rule 9(d). That rule in part states, "No claim, remedy, counterclaim or affirmative defense will be considered by the Arbitrator in the absence of prior notice to the other parties...." Hansen's position is neither a claim, remedy, counterclaim or affirmative defense. Even if it were, Hansen's position was clearly set out in the April 25, 2007, letter. Hence, there was no violation of notice requirements.

Although DSD did sell "Liquid Ice" to a few clients, it transferred that product to Ott/WWG when Hansen informed DSD the product was considered a competing one. Hansen did not have a similar blue raspberry product. There has been no showing DSD failed to vigorously and

diligently distribute "Monster." In fact, Hansen has described DSD's manager as doing "a great job." Ray Mehringer was always satisfied with DSD's performance, considered them fully committed to selling Hansen products and believed they fully complied with the Distributorship Agreement. He never told anyone at DSD their performance was unsatisfactory. In retrospect, DSD did not achieve annual sales goals but did grow the sales substantially each year. They understood these goals were not quotas. Some goals were based on sales outside DSD's territory which were made at Hansen's request. When Hansen asked DSD to stop selling outside the territory, the goals were not reduced accordingly.

In sum, the April 25, 2007, letter reflects dissatisfaction with sales never previously conveyed to DSD and the "Liquid Ice" complaint was remedied timely. Hansen has simply not demonstrated good cause for termination.

C. DSD is Not Entitled to Distribute "Java Monster."

DSD claims it is entitled to distribute "Java Monster" pursuant to the Distributorship Agreement. Hansen did not release this product until after this dispute arose. In that agreement, DSD acknowledges it has no right to distribute any Hansen products other than those set out in Exhibit A. Eight products are listed (Exh. 8, A). Any sales of additional products other than those listed in Exhibit A shall not constitute an express or implied additional distributorship agreement (Exh. 8, ¶2(c)). The parties entered into their agreement December 1, 2004, although Ott and WWG had previously entered similar agreements which were essentially superceded by this one.

Hansen did not launch "Java Monster" until May 2007, about a month after the termination letter. "Java Monster" is a coffee based milk and cream product which is cooked under pressure in the can. Hansen

not contain coffee, milk, and cream. It believes it is a "totally different type of drink." "Java Monster" is intended for display with other coffee products, not with sodas, or Hansen feels it will be "cannibalizing" its products or competing with itself. Hansen has assigned distributorship rights to "Java Monster" in many territories, including this one, separately from its soda based "Monster" products. Hansen has never made "Java Monster" available to DSD. Based on these facts, DSD has no right under the plain terms of the Distributorship Agreement to distribute "Java Monster." Moreover, there can be no equitable estoppel because there has been no showing DSD relied to its detriment on an expectation it would receive this new product which was not launched until after this dispute. DSD's actions have been entirely to promote the sales of products they are authorized to receive.

D. There Has Been No Constructive Termination.

DSD argues Hansen has constructively terminated the distributorship by sending the April 25, 2007, letter and by refusing to sell "Java Monster" to DSD. DSD further argues Hansen violated the WFDL because it did not give DSD 90 days' advance notice of its decision not to make DSD its "Java Monster" distributor. As previously explained, DSD is not entitled to "Java Monster" under the contract terms and the April 25, 2007 letter, about which DSD complains, did not terminate the relationship. The letter specifically states the distributorship will remain in full force and effect until terminated by arbitration, subsequent notice, or written settlement. Hansen has continued to provide DSD with all products it customarily received and DSD would have actually made a small profit last year but for its attorney's fees. Hansen has preserved the status quo pending the outcome of this arbitration. In fact, Hansen set 2008 marketing goals with DSD in the same manner in which they were set

before the letter.

Although DSD originally sought injunctive relief in Wisconsin State Court (Exh. 88), it has not applied for such relief in this arbitration and, instead, seeks damages for termination. There has been no termination, because DSD is a dealer under the WFDL and Hansen's CEO Mr. Sacks has testified his company will honor the Distributorship Agreement if DSD is adjudicated a dealer.

In Super Valu Stores v. D-Mart, 146 Wis.2d 568 (Wisc. Ct. App. 1988) the court found no constructive termination or substantial change in competitive circumstances of a dealership agreement when the grantor planned to open a competing retail store in its dealer's territory after allowing that dealer exclusive retailer privilege there for several years. Because the parties' written agreement was nonexclusive and specifically authorized the grantor to open other stores within that territory, the court held acting on that contractual right did not violate the distributorship agreement. "Compliance with the express terms of the dealership agreement cannot, under the circumstances of this case, give rise to a violation of [WFDL]." Id. at p.576-577. "But where, as here, a contracting party complains of acts of the other party which are specifically authorized in their agreement, we do not see how there can be any breach of the covenant of good faith. [***12] Indeed, it would be a contradiction in terms to characterize an act contemplated by the plain language of the parties' contract as a 'bad faith' breach of that contract." Id.

DSD argues Jungbluth v. Hometown, Inc., 201 Wis.2d 320 (1996) applies here. That case holds, "A decision which clearly strengthens the relative position of grantors at the expense of dealers does not embrace the spirit of the fair dealership law.... While we recognize that the dealership agreement is essential in defining the various terms of the business

relationship between the parties, we are also mindful the relationship can be one sided.... Therefore, one should not focus merely upon contractual provisions." Id., at 330-331. In Jungbluth a franchisor remodeled its dealer's service station for seven months without first providing adequate notice of this substantial change in competitive circumstances. The court found a violation of the WFDL because the franchisor's actions, although arguably permitted by contract, rendered the dealer financially crippled. That is not what has happened to DSD.

The Distributorship Agreement in this case specifically identifies the products to be distributed. It clearly states DSD has no right to distribute any Hansen products other than those identified and any sales of additional products shall not constitute an express or implied additional agreement (Exh. 8). DSD has no contractual right to distribute "Java Monster." Hansen has continued to honor the agreement in all respects and has preserved the status quo pending the outcome of this arbitration. There has been no substantial change in competitive circumstances and DSD is making a profit for the first time. In sum, there was no 90 day notice requirement because DSD was not entitled to distribute "Java Monster," DSD continued to distribute all products it ever distributed, and there has been no constructive termination.

IV. CONCLUSION AND FURTHER PROCEEDINGS

1. DSD has demonstrated it is a dealer within the meaning of the WFDL and that there exists no good cause for termination. DSD abandoned its claim for injunctive relief. Hansen has demonstrated DSD is not entitled to distribute "Java Monster," there has been no constructive termination, and DSD is not entitled to damages. Hansen did not pursue damages and related claims against DSD.

2. The Distribution Agreement provides in Section 19 the

2. The Distribution Agreement provides in Section 19 the Arbitrator shall have the power to award reasonable attorney fees to the prevailing party (Exh. 4). The WFDL similarly allows reasonable fees for a dealer who prevails on damages or injunctive relief. Wis.Stat. §135.06. However, dealers unsuccessful in obtaining either injunctive relief or damages are not entitled to attorney fees. Lindevig v. Dairy Equip. Co., 150 Wis.2d 731, 742; Dade v. Day Food Co., 138 Wis.2d 525. As previously explained, DSD abandoned its claim for injunctive relief and did not prevail on its damages claim. However, DSD did demonstrate it was a dealer and no good cause existed for termination. Hansen proved DSD is not entitled to distribute "Java Monster," there has been no constructive termination, and no damages are owed DSD. Because each party has prevailed on equally important issues, each will bear its own fees and costs.

3. This Final Award resolves all issues between the parties in this arbitration.

Dated: April 4, 2008.

HON. J. RICHARD JADEN (Ret.),
Arbitrator

PROOF OF SERVICE BY FACSIMILE & U.S. MAIL

Re: Hansen Beverage Company vs. DSD Distributors, Inc.
Reference No. 1200039281

I, Jenny Griffin, not a party to the within action, hereby declare that on April 4, 2008 I served the attached FINAL AWARD on the parties in the within action by facsimile and depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Diego, CALIFORNIA, addressed as follows:

Julie A. Lewis Esq.
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Leila Nourani Esq.
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2029 Century Park East
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Los Angeles, CA 90067
Tel: (310) 277-2223
Fax: (310) 557-8475

I declare under penalty of perjury the foregoing to be true and correct. Executed at San Diego, CALIFORNIA on April 4, 2008.

Jenny Griffin

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

DSD DISTRIBUTORS, INC.,
a Wisconsin corporation,
Plaintiff,

vs.

HANSEN BEVERAGE COMPANY,
a California corporation,
WISCONSIN DISTRIBUTORS SOUTH, LLC,
a Wisconsin corporation, and
RIVER CITY DISTRIBUTING CO., INC.,
a Wisconsin corporation,
Defendants.

Case No.: 07-CV-1120

CERTIFICATE OF SERVICE

STATE OF WISCONSIN)
: ss
COUNTY OF ROCK)

Wendy Schneider, being first duly sworn on oath deposes and states that on the 4th day of April, 2008, a true and correct copy of the following documents:

- Plaintiff's Notice of Motion and Motion for Partial Vacation of Arbitration Award
- Affidavit of Julie Lewis

were served by facsimile and U.S. Mail on:

Tanya Schierling
Solomon Ward Seidenwurm & Smith, LLP
401 B Street Ste 1200
San Diego CA 92101

Attorney William H. Levit, Jr.
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Capitol Square Office
Two E Mifflin St Ste 600
Madison WI 53703-2865

DATED this 4th day of April, 2008.

Wendy Schneider

Wendy Schneider

Subscribed and sworn to before me
this 4th day of April, 2008.

Teresa L. Drayer

Notary Public, Rock County, WI
My Commission expires: 11-20-2011 .

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

DSD DISTRIBUTORS, INC.,
a Wisconsin corporation,
616 Gateway Drive
Milton, Wisconsin 53563,

Plaintiff,

vs.

HANSEN BEVERAGE COMPANY,
a California corporation,
1010 Railroad Street,
Corona, California 92882,

WISCONSIN DISTRIBUTORS SOUTH, LLC,
a Wisconsin corporation,
900 Progress Way
Sun Prairie, Wisconsin 53590,

and

RIVER CITY DISTRIBUTING CO., INC.,
a Wisconsin corporation,
1224 Clark Street
Watertown, WI 53094,

Defendants.

VERIFIED COMPLAINT AND REQUEST FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Case No.: 07-CV- 1120

Case Code No.:

FILED
ROCK COUNTY, WI.
2007 JUL 20 PM 3:32
ELOISE WELKE
CLERK OF CIRCUIT COURT

For its Complaint against Defendants Hansen Beverage Company, Wisconsin Distributors South, LLC and River City Distributing Co., Inc., DSD Distributors, Inc., through its attorneys Nowlan & Mouat, LLP and Julie A. Lewis, states and alleges as follows:

Introduction

1. This action arises out of Defendant Hansen Beverage Company's ("Hansen") threat to terminate the Plaintiff, DSD Distributor, Inc.'s ("DSD") dealership and Defendants' substantial change in the competitive circumstances of the dealership in violation of the terms of the Hansen

Beverage Company Distribution Agreement (the "Agreement") and the Wisconsin Fair Dealership Law ("WFDL"), *Wis. Stat. §§ 135.01, et seq.*

2. This dispute also arises out of Defendants' actions replacing DSD with Wisconsin Distributors South, LLC ("Wisconsin Distributors) and River City Distributors, Inc. ("River City") as the distributor of its Monster Java brand product and notifying vendors and buyers in DSD's exclusive territory that DSD would be replaced by Wisconsin Distributors or River City on all Hansen Monster products in violation of the WFDL and the Agreement.

3. The merits of the dispute will ultimately be determined pursuant to arbitration as provided by the Agreement and the Federal Arbitration Act, *9 U.S.C. §§ 1 et seq.* In this action, DSD is not asking the Court to determine whether Hansen has violated the WFDL. Rather, DSD is requesting a judgment declaring that the WFDL applies in resolving the rights and obligations of the parties under the agreement.

4. Further, DSD requests that the Court issue a temporary injunction to maintain the status quo of the parties until a final disposition on the merits is reached. DSD asks the Court to enjoin Defendants from a) terminating the dealership until a final disposition on the merits has been reached, and b) substantially changing the competitive circumstances of the Agreement without good cause by:

- Discussing with DSD's customers the status of the Agreement and DSD's business operations through contact between Defendants' owners, employees, agents or representatives and the owners, employees, agents or representatives of DSD's customers,

- Changing or instructing DSD's customers to change any dealership information on shelf tags or other documents within DSD's exclusive territory that names DSD as the product distributor,
- Authorizing, allowing or carrying out the distribution of any Hansen product, including all Monster brand and energy products, within DSD's exclusive territory by any distributor other than DSD,
- In the case of Wisconsin Distributors and River City, distributing Hansen products, including Monster Java, in DSD's exclusive territory,
- Otherwise interfering with or restraining DSD's business.

5. An actual controversy exists between DSD and Hansen regarding the choice of law. The Agreement drafted by Hansen maintains that California law should govern disputes relating to the Agreement. Because DSD is a dealer under the WFDL, it is entitled to the protections of that Wisconsin statute regardless of the choice of law in the Agreement.

Parties

6. DSD is a Wisconsin corporation with its principal place of business at 616 Gateway Drive, Milton, Wisconsin, 53563. DSD distributes non-alcoholic beverages to retail outlets in south central Wisconsin.

7. Hansen is California corporation with its principal place of business at 1010 Railroad Street, Corona, California, 92882. Hansen manufactures and sells non-alcoholic beverages, including the Monster brand energy drinks, throughout the United States and in Rock County, Wisconsin.

8. Wisconsin Distributors is a Wisconsin limited liability corporation with its principal place of business at 900 Progress Way, Sun Prairie, Wisconsin 53590. Wisconsin Distributors

distributes alcoholic and non-alcoholic beverages on and off-premise to vendors in Wisconsin including Rock County, Wisconsin.

9. River City is a Wisconsin corporation with its principal place of business at 1224 Clark Street, Watertown, Wisconsin 53094. River City distributes alcoholic and non-alcoholic beverages on and off-premise to vendors in Wisconsin including Rock County in Wisconsin.

Jurisdiction

10. This Court has subject matter jurisdiction in this case pursuant to the Wisconsin Fair Dealership Law, Wis. Stat. §§ 135.01, et seq.

11. This Court has personal jurisdiction over the parties pursuant to Wis. Stat. § 801.05(5), as this action relates to the rights and obligations of the parties under a contract performed in Rock County, Wisconsin.

12. Venue is proper in Rock County pursuant to Wis. Stat. § 801.50(2) because a substantial part of the events or omissions giving rise to this action occurred in Rock County, Wisconsin.

Procedural Background

13. Defendant Hansen has filed a request for declaratory judgment in the United States District Court for the Central District of Los Angeles, California, Case No. 07-CV-2712, asking for a judicial declaration that the Arbitration clause in the Agreement is binding, valid, and enforceable with respect to determining the parties' rights and obligations under the Agreement. Defendant Hansen has also filed a request for arbitration in California with JAMS/Endispute.

14. On June 7, 2007, DSD filed a motion to dismiss for lack of personal jurisdiction or, alternatively, to transfer venue to the United States District Court for the Western District of Wisconsin.

15. The court for the Central District of Los Angeles denied DSD's motion to dismiss the declaratory judgment request for lack of personal jurisdiction on July 12, 2007. The court has not ruled on DSD's motion to transfer venue to the Western District of Wisconsin. DSD has asked the court to reconsider and clarify its decision on personal jurisdiction with respect to DSD's pending motion to transfer venue and the applicability of the WFDL to the case.

16. Due to the motions pending before the court, DSD has not filed its Answer to Hansen's declaratory judgment action. DSD has appeared at a pre-hearing conference for the arbitration under a reservation of rights and has filed a motion to stay arbitration until judgment has been entered on Hansen's declaratory judgment request.

17. JAMS/Endispute does not have the authority to issue injunctive relief of any kind in any arbitration proceeding submitted to it for determination or decision.

FACTS

A. Distribution Agreement

18. On or about December 1, 2004, DSD and Hansen signed a distribution agreement entitled "Hansen Beverage Company Distribution Agreement" ("Agreement"). A copy of the Agreement is attached hereto as Exhibit A.

19. The Agreement was drafted by Hansen. The Agreement was presented on a "take it or leave it" basis and its terms were not negotiated by the parties. At the time the Agreement was signed, DSD had been distributing Hansen products for over one year.

20. In the Agreement, DSD became the exclusive distributor of Hansen beverage products, specifically its Monster brand products, to locations in Jefferson, Rock and parts of Dodge and Dane counties in Wisconsin. These accounts included convenience stores, chain convenience stores, delis, independent groceries, chain groceries, mass merchandisers, drug stores, schools,

hospitals, health food stores, military facilities, alcoholic licensed on-premise vendors and club stores. *Agreement, Exhibits A and C.*

21. As the exclusive Hansen distributor, DSD was granted the authority under the Agreement to distribute Monster brand products to 1) all accounts in Rock County; 2) all accounts in Jefferson County; 3) to the portion east of Edgerton Road to Lake Koshkonog and Bingham Road and south of Highway 106 to the Rock County line in Dane County; and 4) to the cities/towns of Old Lebanon, Old Ashippun, New Ashippun, Clyman, Richwood, Shield, Emmett and Watertown in Dodge County. *Agreement, Exhibit B.*

22. Hansen and DSD agreed that DSD would implement a marketing plan for Monster brand products that would be reviewed and agreed upon by Hansen. *Agreement, ¶ 13.*

23. Hansen and DSD agreed that DSD would be required to secure extensive in-store merchandising and optimal shelf positioning, achieve effective distribution levels, report monthly sales data, purchase and carry inventory and use the Monster product trademark for Hansen's best interest in order to gain significant market share for Hansen. *Agreement, ¶¶ 3, 10, 13.*

24. Under the Agreement, DSD's extensive promotion and sales production was the financial responsibility of DSD. *Agreement, ¶ 3.*

25. From 2004 to the present, DSD has used its best efforts to comply with the Agreement and expand Hansen's market share in its exclusive territory. Since 2004, DSD has developed a substantial client base for Monster brand products in its territory that has provided substantial benefit for Hansen in terms of increased sales, profit, brand name recognition, good will and an extensive customer list.

26. Sales of Hansen products, particularly the Monster brand products, were almost non-existent in DSD's territory before DSD began distributing the products. Upon information and belief, DSD has made Monster brand products a leader in the soft drink market in its territory which has benefited Hansen and will benefit Wisconsin Distributors and River City if they are allowed to take over DSD's territory and accounts.

27. The Agreement provides that it will be governed by and interpreted in accordance with the laws of the State of California without reference to California's law of conflict of laws. It also provides that any "dispute, controversy or claim arising out of or relating to" the Agreement or the breach or termination thereof was to be settled by binding arbitration "conducted by JAMS/Endispute in accordance with the JAMS rules of procedure." *Agreement, ¶ ¶ 18, 19.*

28. The JAMS Comprehensive Arbitration Rules and Procedures do not contain any provision for injunctive relief.

29. The Agreement does not reference the WFDL and does not contain the terms required by the WFDL including the 90 day notice and cure provision contained in *Wis. Stat. § 135.04*, the requirement that inventories be repurchased at fair wholesale market value contained in *Wis. Stat. § 135.045* and the requirement that grantors may only terminate, cancel, fail to renew or substantially change the competitive circumstances of the agreement without good cause contained in *Wis. Stat. § 135.03*.

B. Community of Interest

30. DSD made a substantial investment in its Monster distribution business including renting a new facility at a cost of $ $27,000 per year; hiring three new sales, warehouse and distribution employees; and purchasing three vehicles for the purpose of distributing Monster brand products.

31. DSD serves approximately 350 accounts in its territory for distribution of Monster brand products including 150 vendors in Janesville, Wisconsin, who do not have a city permit to sell liquor and sell only non-alcoholic beverages.

32. Since January 2004, DSD's product list for Monster brand products distributed under the terms of the Agreement and through the parties' course of conduct has grown from five products in 2004 to 16 products in 2007.

33. Monster brand products currently make up 65% of DSD's product line and represent 65% of its revenue.

34. The loss of the Hansen products, specifically the Monster brand, will result in the immediate termination of DSD's business.

C. Performance under the Agreement

35. From January 2004 to April 25, 2007, DSD performed under the Agreement without notice from Hansen of concerns or problems of any kind.

36. DSD has met or exceeded all of Hansen's sales and marketing goals for Hansen and Monster brand products and, until April 25, 2007, met or exceeded all of the contractual requirements contained in the Agreement.

37. Hansen did not, at any time before April 25, 2007, notify DSD either verbally or in writing of any concerns or complaints it had with DSD's performance under the Agreement.

D. Notice of Termination

38. On April 25, 2007, Hansen, through its attorneys, gave DSD 90 days notice of its intent to terminate the Agreement due to alleged breaches of the Agreement by DSD. A copy of the Notice of Termination is attached hereto as Exhibit B.

39. Hansen's 90 day notice of termination included a 60 day cure period but did not describe either the actions in which DSD engaged to breach the agreement or the steps DSD would have to take to cure the alleged breach. The description of the breaches of the Agreement simply recite the standard terms of the Agreement but do not in any way describe DSD's actions in violation of the Agreement.

40. Hansen's notice of termination states that "[Hansen] intends to terminate the Distribution Agreement for good cause ninety (90) days from the date of this notice" if the "breaches are not cured and remedied within sixty (60) days of Distributor's receipt of this letter ... ." Ninety days from the date of the notice is July 24, 2007. The WFDL requires 90 days notice from the date the dealer receives the notice which would be July 26, 2007

41. Hansen's notice of termination does not describe the steps Hansen would require DSD to take to cure the alleged breaches.

42. Hansen's notice of termination states that the Agreement would remain in full force and effect until terminated "(a) in accordance with adjudication of the Arbitration, (b) by written notice by HBC if Distributor fails to cure and remedy the foregoing breaches, or (c) under the terms of a written settlement agreement executed by HBC and the Distributor." In other words, DSD was being required to settle its claims at Hansen's price, rather than at fair market value, or be terminated as a Hansen distributor.

43. On June 25, 2007, DSD responded to Hansen's notice of termination by objecting to the vague allegations of breach and requesting additional information with which to determine what the allegations of breach actually were. A copy of DSD's response to the Notice of Termination is attached hereto as Exhibit C.

44. Hansen has not responded to DSD's letter.

E. Violation of the WFDL and Breach of the Agreement

45. Upon information and belief, on or about May 6, 2006, Hansen entered into a Distribution Coordination Agreement with Anheuser Busch, Incorporated, ("AB") promising to give certain Hansen Monster brand territories in Wisconsin to AB distributors.

46. Upon information and belief, in early 2007, Hansen agreed to give DSD's distribution rights under the Agreement to AB distributors Wisconsin Distributors and River City.

47. On or about June 11, 2007, Hansen Regional Manager Tom Barnes informed DSD that Wisconsin Distributors and River City would be distributing Hansen product Monster Java in DSD's exclusive territory.

48. Wisconsin Distributors and River City are currently distributing Monster Java brand to DSD's accounts in DSD's territory.

49. Upon information and belief, on or about July 17, 2007, DSD's Pick 'N Save accounts replaced DSD with River City as the named distributor on Monster brand product shelf tags.

50. In July 2007, DSD's vendors told DSD that "it's only a matter of time" and that they knew DSD's dealership was going to be terminated.

F. Fair Wholesale Market Value

51. Defendants limited the repurchase price for DSD's inventory of Monster brand products to $3.00/case in the Distribution Agreement. Upon information and belief, fair wholesale market value for Monster brand products is greater than $32.00/case.

FIRST CAUSE OF ACTION:
REQUEST FOR DECLARATORY RELIEF

52. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs one through 51 of this Complaint as if fully set forth herein.

53. Under the Agreement, Hansen and DSD created a "dealership" in which Hansen is a "grantor" and DSD is a "dealer" as defined in Wis. Stat. § 135.02(2), (3) and (5).

54. By and through this dealership, DSD developed and conducted a substantial amount of business in its exclusive territory and developed a "community of interest" as defined in Wis. Stat. § 135.02(1).

55. DSD seeks a declaratory judgment under Wis. Stat. § 806.04 declaring that the Wisconsin Fair Dealership Law applies to the parties to this Complaint.

SECOND CAUSE OF ACTION:
REQUEST FOR TEMPORARY INJUNCTION

56. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs one through 55 of this Complaint as if fully set forth herein.

57. DSD will suffer irreparable injury if injunctive relief is not granted and the dealership is terminated as of July 24, 2007.

58. DSD has suffered and will continue to suffer irreparable injury if Hansen, Wisconsin Distributors or River City or any of their employees, agents or representatives are allowed to continue to discuss with DSD's customers Hansen's threatened termination of the Agreement and/or the status of DSD's operations.

59. Wisconsin Distributors' and/or River City's interference with and usurpation of DSD's customer base would immediately destroy DSD's ability to continue as an ongoing business, for which there is no adequate remedy at law.

60. By operation of law, Defendants' actions are deemed an irreparable injury to DSD for purposes of DSD's request for a temporary injunction under Wis. Stat. § 135.065.

61. DSD is likely to succeed on the merits of this matter because all elements of the WFDL have been satisfied, Hansen's notice of termination is defective as a matter of law, Defendants' actions substantially change the competitive circumstances of the dealership agreement without good cause, Hansen has declared its intent to terminate the dealership agreement without good cause and Hansen has declared its intent not to pay fair wholesale market value for DSD's inventories.

62. Defendants will not suffer irreparable harm if injunctive relief is issued because any loss suffered would result from benefits that were not theirs to begin with.

63. The public interest will be served by issuance of a temporary injunction to maintain the parties' status quo until a final disposition on the merits of the matter is reached.

WHEREFORE, DSD respectfully asks this Court to enter judgment against the Defendants as follows:

(a) A judicial declaration declaring that the Wisconsin Fair Dealership Law applies in resolving the rights and obligations of the parties under the Agreement.

(b) A temporary injunction to maintain the parties' status quo until a final disposition on the merits is reached. Specifically, DSD asks the Court to enjoin Defendants from:

1) Terminating the dealership before a final disposition of the dispute on the merits is reached,

2) Discussing with DSD's customers the status of the Agreement and DSD's business operations through contact between Defendants' owners,

employees, agents or representatives and the owners, employees, agents or representatives of DSD's customers,

3) changing or instructing DSD's customers to change any dealership information on shelf tags or other documents within DSD's exclusive territory that names DSD as the product distributor,

4) authorizing, allowing or carrying out the distribution of any Hansen product, including all Monster brand and energy products, within DSD's exclusive territory by any distributor other than DSD,

5) Allowing any distributor other than DSD to distribute Monster brand products in DSD's exclusive territory,

6) Enjoining Wisconsin Distributors and River City from distributing Hansen products, including Monster Java, in DSD's exclusive territory,

7) Otherwise interfering with or restraining DSD's business in any way.

(c) Awarding to DSD its reasonable attorneys' fees, costs, and expenses, including expert witness fees, which DSD necessarily incurred in bringing and pressing this case;

(d) Awarding such other and further relief as it deems proper.

Dated this 26th day of July, 2007.

By: Julie Lewis
Julie A. Lewis
State Bar No.: 1048367

NOWLAN & MOUAT LLP
100 S. Main Street
P.O. Box 8100
Janesville, WI 53547-8100
(608) 755-8100

Attorneys for the Plaintiff

VERIFICATION

I, Steven R. Bysted, am the President of the Plaintiff, DSD Distributors, Inc. I have read the Complaint and have personal knowledge of the allegations contained therein. I believe the allegations contained in the Complaint are true and correct in all respects and, if called upon, could and would testify competently thereto.

Dated this 26th day of July, 2007.

Steven R. Bysted

Subscribed and sworn to before me
this 26th day of July, 2007.

Julie Lewis
Notary Public, State of Wisconsin
My commission expires I'm not sure

JULIE A. LEWIS NOTARY PUBLIC STATE OF WISCONSIN

HANSEN BEVERAGE COMPANY
DISTRIBUTION AGREEMENT

AGREEMENT, made as of this 1ST day of DECEMBER, 2004, between HANSEN BEVERAGE COMPANY ("HBC"), with offices at 1010 Railroad Street, Corona, California 92882, and DSD DISTRIBTUORS INC. ("Distributor"), with offices at 607 SOUTH ARCH STREET JANSVILLE, WI 53548.

1. Definitions. When used herein, (a) the word "Products" means those products identified in Exhibit A hereto with an "X"; (b) the word "Territory" means the territory identified in Exhibit B hereto; (c) the word "Accounts" means those accounts identified in Exhibit C hereto; and (d) the word "Trademarks" means those names and marks identified on Exhibit D hereto.

2. Appointment.

(a) HBC appoints Distributor, and Distributor accepts appointment, as a distributor of Products only to Accounts within the Territory. Such appointments may be either exclusive or non-exclusive, as the case may be, as designated on Exhibit C hereto. Unless otherwise agreed by HBC, Distributor specifically covenants not to sell or otherwise transfer in any manner any Products except to Accounts within the Territory. The Distributor shall be entitled to appoint sub-distributors within the Territory provided that the terms of such appointments shall not be inconsistent with the terms and conditions of this Agreement and shall be subject to HBC's rights hereunder.

(b) Distributor hereby agrees not to sell, transfer and/or assign any Products, either directly or indirectly, to any other persons and/or entities located outside the Territory nor to any persons and/or entities within the Territory with regard to whom Distributor has knowledge or reasonable belief will distribute and/or sell the Products outside of the Territory.

(c) Distributor acknowledges and agrees that it has no right to distribute any products of HBC other than the Products identified in Exhibit A hereto with an "X". Any sales by HBC to Distributor of any products of HBC other than the Products identified in Exhibit A with an "X" and/or that are not listed on Exhibit A, and/or any Products sold by HBC to Distributor and/or its subdistributor/s beyond the scope, term or after the termination of this Agreement, with or without cause, for any reason or no reason at all (i) shall not constitute, be construed as, or give rise to, any express or implied Distribution Agreement, course of conduct or other relationship between HBC and Distributor; (ii) shall not confer upon Distributor or its subdistributor/s any rights of any nature whatsoever, including without limitation to purchase and/or sell or continue to purchase and/or sell any products, including Products, or use the Trademarks other than with respect to Products sold and delivered by HBC to the Distributor and (iii) shall constitute a separate transaction for each shipment of products actually delivered by HBC to Distributor and/or subdistributor/s, at HBC's sole and absolute discretion, which HBC shall be entitled to exercise, vary, withdraw and/or cease, on a case by case basis, at any time in HBC's sole and absolute discretion. Distributor irrevocably waives, releases and discharges any claims, liabilities, actions and rights, in law or in equity, against HBC including without limitation for damages, compensation or severance payments or any other claims of whatsoever nature to Distributor arising from or in connection with the matters referred to in this section 2(c) and/or any acts, omissions or conduct of HBC.

3. Distributor's Duties. Distributor shall:

(a) vigorously and diligently promote and achieve the wide distribution and sale of Products to Accounts within the Territory to the reasonable satisfaction of HBC; Distributor shall permit HBC representatives to work sales routes with the Distributor's salesmen;

(b) secure extensive in-store merchandising and optimal shelf positioning with respect to Products in Accounts within the Territory to the reasonable satisfaction of HBC;

(c) perform complete and efficient distribution functions throughout the Territory to the reasonable satisfaction of HBC;

(d) fully implement and execute the annual marketing plans to be agreed upon from time to time in accordance with Clause 13 below and achieve and maintain where appropriate all of the objectives set with respect thereto; and

(e) achieve and maintain the minimum distribution levels relating to Products as set forth on Exhibit E hereto during the initial term and achieve and maintain the agreed minimum distribution levels relating to Products in respect of each renewal term in accordance with Clause 13 below.

(f) provide HBC on or before the tenth (10th) day of each calendar month with a schedule showing for the previous month (i) sales by flavor and package, (ii) number of new accounts opened, (iii) aggregate number of active accounts for Product; and

(g) maintain in strict confidence all commercial information disclosed by HBC to Distributor (which obligation shall expressly survive termination of this Agreement for any reason).

4. Prices. The prices of Products shall be as set forth in HBC's then current price list as the same may be changed from time to time by HBC upon written notice to Distributor.

5. Orders. All purchase orders for Products shall be in writing and shall be subject to acceptance by HBC. All such purchase orders shall be deemed acceptances of HBC's offers to sell Products and shall limit acceptance by Distributor to the terms and conditions thereof.

6. Payment. Distributor shall promptly pay the prices of Products in full (without deduction or set-off for any reason) in accordance with the payment terms set forth in HBC's invoice. If Distributor is delinquent in payment, upon presentation of invoice, Distributor shall reimburse HBC for any costs and expenses incurred by HBC in collecting such delinquent amounts, including, without limitation, legal expenses, interest at 1% per month or part thereof from the due date(s), and fees of collection agencies.

7. Security Interest. HBC reserves, and Distributor grants to HBC, a security interest in Products sold to Distributor on credit (if any). Distributor acknowledges that this Agreement constitutes a security agreement between HBC, as secured creditor, and Distributor, as debtor, for the purposes of the Uniform Commercial Code. Distributor agrees to execute and deliver to HBC such financing statements and other instruments as HBC may reasonably request in order to perfect its security interest.

8. Delivery. Unless otherwise agreed in writing by the parties, Products will be tendered by HBC for delivery to Distributor in full truckload quantities. Distributor acknowledges that delivery dates set forth in purchase orders for Products accepted by HBC are merely approximate and that HBC shall have no liability for late deliveries.

9. Trademarks.

(a) Distributor shall not use any trademark, brand name, logo or other production designation or symbol in connection with Products other than Trademarks. Distributor acknowledges that it has no right or interest in Trademarks (except as expressly permitted hereunder) and that any use by Distributor of Trademarks will inure solely to HBC's benefit. Distributor may only use Trademarks in strict accordance with HBC's policies and instructions, and HBC reserves the right, from time to time and any time, at its discretion, to modify such policies and instructions then in effect.

(b) Any proposed use by Distributor of Trademarks (to the extent that it either has not been previously approved by HBC or differs materially from a use previously approved by HBC) shall be subject to the prior written consent of HBC. Distributor shall submit to HBC in writing each proposed use of Trademarks in any medium.

(c) Distributor shall not at any time alter Trademarks or the packaging of Products, use Trademarks for any purpose other than the promotion, advertising and sale of Products hereunder, or challenge the validity, or do or refrain from doing any act which might result in impairment of the value, of Trademarks.

(d) Upon the termination hereof, Distributor shall cease and desist from the use of the Trademarks and any names, marks, logos or symbols similar thereto.

10. Promotion. Distributor shall be solely responsible for marketing and promoting Products within the Territory. Distributor shall aggressively distribute and encourage the utilization of merchandising aids and promotional materials in outlets throughout the Territory. Without in any way detracting from the foregoing, Distributor shall participate in and diligently implement all marketing and promotional programs and campaigns that may be agreed to by both Distributor and HBC and which HBC may agree to fund jointly with Distributor on a co-op basis, from time to time.

11. Term and Termination.

(a) The initial term of this Agreement shall commence on December 1, 2004 and shall end on December 31, 2005. Upon the expiration of the initial term, this agreement shall be automatically renewed for additional terms of one year at a time, up to a maximum of fifteen (15) additional one-year terms; provided always that the Distributor (i) is not in breach of any of the provisions of this Agreement, (ii) has fulfilled all of its obligations hereunder, and (iii) has agreed with HBC with respect to the minimum distribution levels and/or annual marketing plan for the forthcoming term, as the case may be, in accordance with Clause 13 below. If all such requirements are not met, then this Agreement shall terminate at the expiration of the then current term.

(b) Either party may terminate this Agreement at any time upon written notice if the other party:

(i) commits a breach of any of the provisions hereof, or

(ii) sells all or substantially all of its assets or outstanding shares of stock entitled to vote, or

(iii) files or has filed against it a petition in bankruptcy, is adjudicated insolvent or bankrupt, makes a general assignment for the benefit of creditors, or has a receiver or trustee appointed for it or for the administration of its assets.

(c) In the event of the termination of this Agreement for any reason whatsoever (and whether such termination is due to the breach of any of the provisions of this Agreement by any party and/or itself is in breach of the Agreement or otherwise):

(i) HBC shall have the right to cancel all of Distributor's purchase orders for Products accepted but remaining unfilled as of the date of termination;

(ii) all amounts payable by Distributor to HBC shall be accelerated and shall immediately become due; and

(iii) neither party shall be liable to the other party in contract, tort or on any other theory of liability for any damage, loss, cost or expense (whether general, special, indirect, incidental, consequential or punitive) suffered, incurred or claimed by the other party as a result of or related to such breach and/or termination (even if the termination results from a breach and the breaching party has been advised of the possibility of such damages), including, without limitation, loss of anticipated profits or goodwill, loss of or damage to goodwill or business reputation or any loss of investments or payments made by either party in anticipation of performing under this Agreement.

(d) In the event HBC continues to supply Products to Distributor for any reason following the termination of this Agreement, Distributor understands and acknowledges that any such action shall not constitute a waiver of HBC's rights under this Agreement or a reinstatement, renewal or continuation of the term of this Agreement. HBC and Distributor agree that if HBC continues to supply Products to Distributor following the termination of this Agreement, (i) Distributor shall be prohibited from selling or otherwise transferring Products except to Accounts within the Territory, (ii) Distributor shall promptly pay the prices of the Products in full (without deduction or set-off for any reason) in accordance with the payment terms set forth in HBC's invoice, and (iii) HBC shall have the right, in its sole discretion, to discontinue supplying Products to Distributor at any time, without notice to Distributor.

(e) Should HBC or any successor to HBC terminate this Agreement without cause, namely, otherwise than pursuant to the express provisions of this Agreement then, provided that the Distributor shall not be in breach of any of the provisions of this Agreement, HBC or its successor, as the case may be, shall be liable to pay to Distributor a severance payment calculated as follows: $3.00 per 24-pack case (reduced on a pro rata basis for cases that contain less than 24 units, i.e. 12-pack cases, but excluding any free units) of *energy* Products in 8-oz., 16-oz. and 23.5-oz. cans and $1.50 per 24-pack case (reduced on a pro rata basis for cases that contain less than 24 units, but excluding any free Products) of all other Products, sold by Distributor during the most recently completed twelve (12) month period ending on the last day of the month preceding the month in which the Agreement is terminated, less the amount, if any, Distributor may receive from any assignee of its rights under this Agreement.

12. Option. HBC shall have the option, exercisable upon written notice to Distributor within thirty (30) days after the date of termination hereof, to repurchase all Products in Distributor's inventory at the prices therefor paid or payable by Distributor (less any freight and insurance charges), F.O.B., Distributor's premises.

13. Annual Marketing Plans. Not less than 60 days before the end of then current term HBC and Distributor shall mutually review the conditions of the marketplace, Distributor's efforts to achieve sales and its results as well as the proposed annual marketing plan which is to be prepared by Distributor and agree on the annual marketing plan, which shall include sales and other objectives and minimum distribution levels to be achieved and maintained by Distributor, for the forthcoming term of this Agreement.

Minimum Distribution Levels. Not less than 60 days before the end of the then current term HBC and Distributor shall mutually agree on the minimum distribution levels for the forthcoming term of this Agreement.

14. The provisions of this clause shall apply only to accounts that have been assigned exclusively to Distributor in terms of Exhibit C hereto. Distributor agrees that should HBC wish to supply Products to any National Account (which shall mean a customer that sells at retail in more than one Territory), HBC shall be entitled to make arrangements directly with such customer and establish the terms of sale of Products to such customer and the prices therefor, which shall take into account the prices then being offered by Distributor and/or other Distributors within whose Territory the customer has Outlets, to such customer or similar categories of customer. Should such customer have one or more outlets within the Territory ("Outlets"), and agree to Outlets being serviced by Distributor, Distributor agrees to service the Outlets in accordance with such arrangements and on the same terms and at the same prices as HBC shall have agreed with the customer concerned. Notwithstanding the foregoing, Distributor shall be entitled to elect not to service the Outlets by giving prompt written notice of such election to HBC. Should the customer not agree to the Outlets being serviced by Distributor or should Distributor elect not to service the Outlets, HBC shall be entitled to service the Outlets directly. In the event HBC services the Outlets directly, HBC shall pay to Distributor, during the remaining term of this Agreement, $0.50 per 24-pack case (reduced on a pro rata basis for cases that contain less than 24 units, excluding any free units) of *energy* Products in 8-oz., 16-oz. and 23.5-oz. cans and $0.25 per 24-pack case (reduced on a pro rata basis for cases that contain less than 24 units, excluding any free units) of all other Products, sold by HBC to the Outlets; provided that Distributor shall have achieved and maintained the agreed distribution levels within the Territory. For the purposes of this Agreement, the number of cases of Products sold by HBC to the Outlets during any period shall be determined by multiplying the total number of cases of products sold by HBC directly to such customer or regional division of such customer, as the case may be, during the period concerned, by a fraction, the numerator of which shall be the number of Outlets and the denominator of which shall be the total number of Outlets that the customer has within the United States or within the regional division of such customer, as the case may be.

15. Amendment. Except to the extent otherwise expressly permitted by this Agreement, no amendment of this Agreement shall be effective unless reduced to a writing executed by the duly authorized representatives of both parties.

16. Assignment. Distributor may not assign its rights or delegate its obligations hereunder without the prior written consent of HBC. Any purported assignment or delegation by Distributor, in the absence of HBC's written consent, shall be void.

17. No Agency. The relationship between HBC and Distributor is that of a vendor to its vendee and nothing herein contained shall be construed as constituting either party the employee, agent, partner or coventurer of the other party. Neither party shall have any authority to create or assume any obligation binding on the other party.

18. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California (without reference to its law of conflict of laws).

19. Arbitration. Any dispute, controversy or claim arising out of or relating to this Agreement or the breach or termination hereof shall be settled by binding arbitration conducted by JAMS/Endispute. ("JAMS") in accordance with JAMS Comprehensive Arbitration Rules and Procedures (the "Rules"). The arbitration shall be heard by one arbitrator to be selected in accordance with the Rules, in Orange County, California. Judgment upon any award rendered may be entered in any court having jurisdiction thereof. Within 7 calendar days after appointment the arbitrator shall set the hearing date, which shall be within 90 days after the filing date of the demand for arbitration unless a later date is required for good cause shown and shall order a mutual exchange of what he/she determines to be relevant documents and the dates thereafter for the taking of up to a maximum of 5 depositions by each party to last no more than 2 days in aggregate for each party. Both parties waive the right, if any, to obtain any award for exemplary or punitive damages or any other amount for the purpose or imposing a penalty from the other in any arbitration or judicial proceeding or other adjudication arising out of or with respect to this Agreement, or any breach hereof, including any claim that said Agreement, or any part hereof, is invalid, illegal or otherwise voidable or void. In addition to all other relief, the arbitrator shall have the power to award reasonable attorneys' fees to the prevailing party. The arbitrator shall make his or her award no later than 7 calendar days after the close of evidence or the submission of final briefs, whichever occurs later.

20. Merger. This Agreement supersedes all prior oral and written communications between the parties concerning, and constitutes their sole and exclusive understanding with respect to, the subject matter hereof.

21. Waivers. No waiver of any provision hereof or of any terms or conditions established by HBC will be effective unless in writing and signed by the party against which enforcement of the waiver is sought.

22. Competitive Products. Distributor shall not sell, market or distribute any products likely to compete with or be confused with any of the Products, during the term of this agreement.

23. HBC represents that no products shall, on the date of purchase or delivery, be adulterated or misbranded or unsafe within the meaning of the Federal Food Drug and Cosmetic Act, including all provisions and amendments pertaining thereto from time to time. HBC indemnifies Distributor and its agents from and against all/or any damages for personal injuries and property damage, including reasonable attorney's fees, resulting from any impurity, adulteration, deterioration in or misbranding of products delivered to Distributor; provided that Distributor gives HBC written notice of any indemifiable claim and Distributor does not settle any claim without HBC's prior written consent. HBC represents that its maintains and will continue to maintain, at its own cost, product liability insurance in the minimum amount of $2,000,000. HBC will supply proof of same to Distributor within a reasonable time after written request therefore from Distributor.

24. Interpretation. In the event of any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement. No provision of this Agreement shall be construed against any party on the grounds that such party or its counsel drafted that provision

25. Severability. If any provision of this Agreement is held invalid for any reason by a court, government agency, body or tribunal, the remaining provisions will be unaffected thereby and shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have caused their duly authorized representatives to execute this Agreement as of the date first above written.

HANSEN BEVERAGE COMPANY
("HBC")

By: _____
Its: Chairman

DSD DISTRIBUTORS INC.
("Distributor")

By: _____
Its: President

EXHIBIT A

THE PRODUCTS

X	Hansen's energy Original Formula 8.3-oz Cans
X	Hansen's Energade 23.5-oz Cans
X	Hansen's Energy Deuce 16-oz Cans
X	Hansen's Energy Pro 16-oz Cans
X	Lost Energy 16-oz Cans
X	Assault Monster Energy 16-oz Cans
X	Monster Energy 16-oz Cans
X	Lo-Carb Monster Energy 16-oz. Cans

To the extent HBC has supplied or may agree to supply any Product to Distributor which is not listed above, it is understood that Distributor's right to sell such Product is limited to that specific transaction only. No course of conduct or usage of trade may be relied upon or construed to create any obligation on HBC to sell or continue to sell such Product/s to Distributor nor shall the same create any right in favor of Distributor.

HBC reserves the right to secure an alternate Distributor or distribution process for any Products that are not actively promoted or sold.

EXHIBIT "B"

EXHIBIT B

THE TERRITORY

State of Wisconsin, Counties of:

Jefferson

Rock

In Dane County, the portion East of Edgerton Road to Lake Koshkonong and Bingham Road and South of Highway 106 to the Rock County Line.

In Dodge County, the cities/towns of: Old Lebanon, Old Ashippun, New Ashippun, Clyman, Richwood, Shield, Emmett and Watertown.

EXHIBIT C

THE ACCOUNTS

Account Type	Distributor Exclusive	Distributor Non-exclusive	Reserved for HBC
Convenience Stores	X		
Chain Convenience Stores	X		
Deli's	X		
Independent Grocery	X		
Chain Grocery	X		
Mass Merchandisers	X		
Drug Stores	X		
Schools	X		
Hospitals	X		
Health Food Stores	X		
Military	X		
Alcoholic Lic. On-Premise	X		
Trader Joe's			X
Club Stores	X		

EXHIBIT D

THE TRADEMARKS

HANSEN'S
HANSEN'S NATURAL
CALIFORNIA'S NATURAL CHOICE
HANSEN'S NATURAL SODAS
HANSEN'S PREMIUM SIGNATURE SODAS
CALIFORNIA'S CHOICE
EQUATOR
IMPORTED FROM NATURE
LIQUID FRUIT
IT'S JUST GOOD
THE REAL DEAL
E_20 ENERGY WATER
MONSTER ENERGY
HANSEN'S E_20 ENERGY WATER
STAMINA
ANTI.OX
D.STRESS
POWER
HEALTHY START
IMMUNEJUICE
INTELLIJUICE
ANTIOXJUICE
VITAMAX.JUICE
DYNAJUICE
POWERPACK
HANSEN'S ENERGY
HANSEN'S ENERGY (DESIGN)
ENERGY
A NEW KIND 'A BUZZ
ENERGY HYDRATION SYSTEM
SLIM DOWN
LOST
LOST ENERGY
LOST ENERGY DRINK
THE "PLANET" LOGO
ENERGADE
RED ROCKER
MONSTER
BLUE SKY
MEDICINE MAN

EXHIBIT E

ANNUAL MARKETING PLAN

PRODUCTS	ACCOUNTS PURCHASING	% of TOTAL ACCOUNTS	ANNUAL CASE SALES
Energy Original Formula	*	*	*
Energade	*	*	*
Energy Deuce	*	*	*
Energy Pro 16-oz Cans	*	*	*
Lost Energy	*	*	*
Assault Monster Energy	*	*	*
Monster Energy	*	*	*
Lo-Carb Monster Energy	*	*	*

* To be agreed for the 2005 calendar year, on or before December 31, 2004.

Percentage of Available Accounts is defined as the total number of Accounts that purchased each of the Products listed above in any 60-day period divided by the total number Available of Accounts that purchased any product from the Distributor in the same 60-day period.

In the event that HBC and Distributor fail to agree on an Annual Marketing Plan for any current term on or before the commencement of such term, HBC shall be entitled, but not obligated, in it's sole discretion, to elect to establish a reasonable Annual Marketing Plan for such term.

Solomon Ward
Attorneys at Law
Solomon Ward Seidenwurm & Smith LLP

Wells Fargo Plaza
401 B Street, Suite 1200
San Diego, California 92101
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Norman L. Smith, Partner
nsmith@swsslaw.com

April 25, 2007

VIA FEDEX

Steven R. Bysted, President
DSD Distributors, Inc.
607 South Arch Street
Janesville, WI 53458

Re: *Distribution Agreement ("Distribution Agreement") dated as of December 1, 2004 between Hansen Beverage Company ("HBC") and DSD Distributors, Inc. ("Distributor"). Capitalized terms used in this letter shall have the meaning ascribed to such terms in the Distribution Agreement*

Dear Mr. Bysted:

This firm represents HBC with respect to the Distribution Agreement. HBC has instructed us to give Distributor notice of numerous, repeated and/or continuing breaches by Distributor of its express obligations under the Distribution Agreement as more fully set forth below. The following description of Distributor's breaches is not intended to be exhaustive but includes without limitation the following:

1. Distributor has, in the past, and currently continues, to sell, market and/or distribute products likely to compete with or be confused with the Products, in violation of Section 22 of the Distribution Agreement;

2. Distributor has continuously violated Section 3(a) by failing to vigorously and diligently promote the wide distribution and sale of Products within the Territory to the reasonable satisfaction of HBC;

3. Distributor has violated Section 3(b) by failing to secure extensive in-store merchandising and optimal shelf spacing to the reasonable satisfaction of HBC;

4. Distributor has violated Section 3(c) by failing to fully implement and execute the annual marketing plans and achieving and maintaining where appropriate all of the objectives set forth therein;

5. Distributor has violated Section3(e) by failing to achieve and maintain the agreed upon distribution levels;

EXHIBIT
VERIFIED COMPLAINT - B

6. Distributor has violated Section 10 by failing to aggressively distribute and encourage the utilization of merchandising aids and promotional materials and has failed to participate in and diligently implement all marketing and promotional programs and campaigns; and

7. Distributor has violated Section 3(f) by failing to provide HBC on or before the tenth day of each calendar month with a schedule showing for the previous month (i) sales by flavor and package, (ii) number of new accounts opened, and (iii) aggregate number of active accounts.

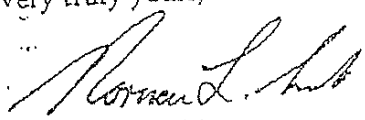
Although we do not believe the Wisconsin Fair Dealership Act applies to the Distribution Agreement, HBC is willing to provide Distributor with sixty (60) days to cure and remedy the foregoing breaches. If the foregoing breaches are not cured and remedied within sixty (60) days of Distributor's receipt of this letter, HBC intends to terminate the Distribution Agreement for good cause ninety (90) days from the date of this notice. In such event, Distributor will not be entitled to receive any severance payment in accordance with Section 11 (e) of the Distribution Agreement because any severance payment is conditional upon HBC terminating the Distribution Agreement without cause and Distributor not being in breach of the Distribution Agreement.

This correspondence also serves as notice that HBC has initiated arbitration proceedings (the "Arbitration") in accordance with the Arbitration Clause in Section 19 of the Distribution Agreement. HBC has also filed a complaint in the United States District Court, Central District of California, Santa Ana Division, for declaratory and injunctive relief. A courtesy copy of the Demand for Arbitration and the complaint is enclosed. HBC intends to fully honor and perform all its obligations under the Distribution Agreement until the Arbitration has been adjudicated or the Agreement is terminated due to Distributor's failure to cure and remedy the breaches referred to above within the applicable period. HBC expects that Distributor will likewise continue to fully honor and perform all its obligations under the Distribution Agreement until it is terminated.

While not obligated to do so, HBC would like to preserve an amicable relationship with Distributor and is therefore willing to negotiate a reasonable severance payment to avoid the unpleasantness of proceedings terminating the Distribution Agreement for cause and the loss by Distributor of the entire severance payment. If HBC and Distributor conduct any discussions or negotiations, such discussions and negotiations shall not affect this notice of breach and Distributor's obligations to cure and remedy such breaches, or the validity and enforceability of the Distribution Agreement unless and until a mutually acceptable settlement agreement has been executed by both HBC and Distributor. In addition, any such discussions or negotiations will be without prejudice to HBC's notice of breach and Distributor's obligation to cure and remedy such breaches within the applicable period. No discussions or negotiations between HBC and Distributor shall constitute or be construed as

an express or implied termination of the Distribution Agreement, which shall remain of full force and effect unless and until terminated (a) in accordance with adjudication of the Arbitration, (b) by written notice by HBC if Distributor fails to cure and remedy the foregoing breaches, or (c) under the terms of a written settlement agreement executed by HBC and Distributor.

Very truly yours,



Norman L. Smith
Solomon Ward Seidenwurm & Smith, LLP

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Nowlan&Mouat LLP

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June 25, 2007

via facsimile and U.S. Mail
(619) 231-4755

Norman L. Smith, Esq.
Solomon Ward Seidenwurm & Smith LLP
401 B Street, Suite 1200
San Diego, CA 92101

Re: Hansen Beverage Company v. DSD Distributors, Inc.
Case No. CV07-2712 FMC(JWJx)

Dear Mr. Smith:

I am writing in response to your letter of April 25, 2007, to our client, DSD Distributors, Inc. ("DSD") regarding the December 1, 2004, Distribution Agreement ("Agreement") between Hansen Beverage Company ("Hansen") and DSD. Your April 25 letter describes seven breach of contract allegations and, in reference to the Wisconsin Fair Dealership Act, Wis. Stat. §§135.01 *et seq.*, extends a 60 day notice and cure period to DSD.

As your letter acknowledges in fact, if not specifically by its terms, the Wisconsin Fair Dealership Act governs DSD and Hansen's dealership, or distribution, agreement. *See* Bush v. National School Studios, Inc., 407 N.W.2d 883 (Wis.1987). DSD does not agree that it has engaged in the actions your letter describes as breaches of the Agreement. In some cases, the allegations made in your letter do not correspond with the language of the Agreement or are too vague to enable a response. In one case, DSD adjusted its distribution practices to ensure that products that Hansen's might consider competitive are distributed through other channels.

You fail, in each allegation, to provide even one example of a specific action in which DSD has engaged that would constitute a breach of the Agreement as you have described it. Further, all of the sections of the Agreement to which you cite refer either to meeting Hansen's "reasonable satisfaction" or to some kind of collaborative objective (*i.e.*, "to be agreed upon from time to time"). Hansen's and DSD have been performing under the Agreement for three years without any significant problems. Your April 25 letter is DSD's first indication that Hansen's thinks DSD is not meeting its contractual obligations in a satisfactory manner. Hansen's did not, at any time before April 25, raise any concerns whatsoever about DSD's performance under the Agreement.

EXHIBIT
tabbies VERIFIED COMPLAINT - C

100 SOUTH MAIN STREET • P.O. BOX 8100 • JANESVILLE, WISCONSIN 53547-8100 • FAX: 608-755-8110 • TELEPHONE: 608-755-8100
nowlan@nowlan.com

Your letter claims DSD breached Sections 3(a), 3(b), 3(c) [3(d)], 3(e), 3(f), 10 and 22. DSD responds as follows:

Section 3(a) - Text of the Agreement: – Distributor shall vigorously and diligently promote and achieve the wide distribution and sale of Products to Accounts within the Territory to the reasonable satisfaction of HBC; Distributor shall permit HBC representatives to work sales routes with the Distributor's salesmen.

Alleged breach: "Distributor has continuously violated Section 3(a) by failing to vigorously and diligently promote the wide distribution and sale of Products with the Territory to the reasonable satisfaction of HBC."

Response: Without more information regarding how, specifically, DSD failed to promote Hansen's Products, we can only respond by stating that DSD has met, and continues to meet, its obligations in this regard.

Section 3(b) - Text of the Agreement: Distributor shall secure extensive in-store merchandising and optimal shelf positioning with respect to Products in Accounts within the Territory to the reasonable satisfaction of HBC.

Alleged breach: "Distributor has violated Section 3(b) by failing to secure extensive in-store merchandising and optimal shelf spacing to the reasonable satisfaction of HBC."

Response: Without more information regarding how, specifically, DSD's efforts to secure extensive in-store merchandising and optimal shelf space failed to meet Hansen's reasonable expectations, we can only respond by stating that DSD has met, and continues to meet, its obligations in this regard.

Section 3(d)[1] – Text of the Agreement: Distributor shall fully implement and execute the annual marketing plans to be agreed upon from time to time in accordance with Clause 13 below and achieve and maintain where appropriate all of the objectives set with respect thereto.

Alleged breach: "Distributor has violated Section 3(c) (*sic*) by failing to fully implement and execute the annual marketing plans and achieving and maintaining where appropriate all of the objectives set forth therein."

Response: Clause 13 of the Agreement calls for Hansen's and DSD to review and agree upon an annual marketing plan each year. The parties met this obligation and, until your April 25 letter, DSD had been given no reason to believe that its sales performance under the 2007 annual marketing plan was unsatisfactory. Your letter does not indicate which accounts, products or locations were not, according to Hansen's, adequately being served by DSD in 2007. Without more specific information, we can only respond by stating that DSD has met, and continues to meet, its obligations in this regard.

[1] / Although your letter refers to Section 3(c), the wording is from Section 3(d).

Section 3(e) – Text of the Agreement: Distributor shall achieve and maintain the minimum distribution levels relating to Products as set forth on Exhibit E hereto during the initial term and achieve and maintain the agreed minimum distribution levels relating to Products in respect of each renewal term in accordance with Clause 13 below.

Alleged breach: "Distributor has violated Section 3(e) by failing to achieve and maintain the agreed upon distribution levels."

Response: This allegation appears to repeat the Section 3(d) breach allegation. Again, without specific information regarding which distribution levels were not being met and how DSD's performance was unsatisfactory, we can only respond by stating that DSD has met, and continues to meet, its obligations in this regard.

Section 3(f) – Text of the Agreement: The Distributor shall provide HBC on or before the tenth (10^{th}) day of each calendar month with a schedule showing for the previous month (I) sales by flavor and package, (ii) number of new accounts opened, (iii) aggregate number of active accounts for Product.

Alleged breach: "Distributor has violated Section 3(f) by failing to provide HBC on or before the tenth day of each calendar month with a schedule showing for the previous month (I) sales by flavor and package, (ii) number of new accounts opened, and (iii) aggregate number of active accounts.

Response: Hansen's Wisconsin representative, Tom Barnes, has been receiving DSD's monthly sales reports throughout the course of the Agreement. Without further information regarding alleged deficiencies from past reports or the type of additional information to which Hansen's believes it is entitled, we can only respond by stating that DSD has met, and continues to meet, its obligations in this regard.

Section 10 – Text of the Agreement – Promotions. Distributor shall be solely responsible for marketing and promoting Products within the Territory. Distributor shall aggressively distribute and encourage the utilization of merchandising aids and promotional materials in outlets throughout the Territory. Without in any way detracting from the foregoing, Distributor shall participate in and diligently implement all marketing and promotional programs and campaigns that may be agreed to by both Distributor and HBC and which HBC may agree to fund jointly with Distributor on a co-op basis from time to time.

Alleged breach: "Distributor has violated Section 10 by failing to aggressively distribute and encourage the utilization of merchandising aids and promotional materials and has failed to participate in and diligently implement all marketing and promotional programs and campaigns."

Response: Although it is difficult to single out one allegation from your letter as the most vague, this one provides no indication whatsoever of DSD's supposed breach. What did DSD do to breach Section 10? Until we receive much more information in this regard, we cannot respond to this allegation.

Nowlan&Mouat LLP

Section 22 – Text of the Agreement – Competitive Products. Distributor shall not sell market or distribute any products likely to compete with or be confused with any of the Products, during the term of this agreement.

Alleged breach: "Distributor has, in the past, and currently continues, to sell, market and/or distribute products likely to compete with or be confused with the Products, in violation of Section 22 of the Distribution Agreement."

Response: Your letter leaves us guessing on this allegation as well. However, to the extent DSD could discern, on its own, the products Hansen's might consider competitive, DSD has redirected those products to another distribution source.

Based on the information you provided, DSD believes it is (1) performing as required by the contract, or (2) has cured any performance deficiency. If you would like to share with us more details regarding Hansen's allegations, we will be happy to respond. Until then, based on the information you provided, we take the position that DSD either denies it has breached the Agreement or submits that it has adequately cured any breach that may have existed.

Sincerely,

NOWLAN & MOUAT LLP

Julie A. Lewis

Enclosure
cc: Attorney Leila Nourani

HON. KENNETH W. FORBECK
CIRCUIT COURT JUDGE, BRANCH 5
ROCK COUNTY COURTHOUSE
51 SOUTH MAIN STREET
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608-743-2237

April 30, 2008

TO: ATTORNEY JULIE A. LEWIS
ATTORNEY MICHAEL R. FITZPATRICK
ATTORNEY WILLIAM H. LEVITT
ATTORNEY WILLIAM E. MCCARDELL

FROM: JUDGE KENNETH W. FORBECK

RE: ***DSD Distributors, Inc. v. Hansen Beverage Co.***
Case No. 07 CV 1120

Dear Counsel:

I have reviewed the submittals made to my office regarding the issue of whether or not this Court should this County take immediate jurisdiction over the above pending litigation or should permit the arbitration to go through its final process and be completed in the federal system in California.

I have reviewed the pleadings, the Orders issued in this case as well as the documentation and arguments provided by counsel. Additionally, I have also reviewed the contract between the parties entitled Hansen Beverage Company Distribution Agreement which contains the Arbitration clause at Para. 19 of that Agreement which is at issue and which is dated December 1, 2004. Finally, I have also reviewed the JAMS Arbitration Rules of Procedure with regard to this type of arbitration. As you are all aware, JAMS, the Arbitration Group, is referred to in the Distribution Agreement in Para. 19.

Based on the information which I have before me and based upon the review of the above, it is my opinion that the arbitration should be completed and finalized in Federal Court in the State of California without intervention of this Court. After the matter has been completed, if there still exists issues to be determined by this Court, we will entertain those issues. However, to do so at this point is premature.

It is my understanding that there will be a hearing in federal court regarding the arbitrator's decision. It is further my understanding that that will take place in June, 2008. After that determination has been made, any party who wishes to come before this Court for what you believe would be further relief under the jurisdiction of this Court may do so.

Thank you.

Sincerely yours,

Kenneth W. Forbeck
Judge, Circuit Court Branch 5

DSD30L

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Attorneys for Petitioner
HANSEN BEVERAGE COMPANY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation,

Petitioner,

v.

DSD DISTRIBUTORS, INC., a Wisconsin corporation

Respondent.

CASE NO. 08-CV-0619 LAB (RBB)

EXHIBIT 4 FILED UNDER SEAL IN SUPPORT OF HANSEN BEVERAGE COMPANY'S OPPOSITION TO THE MOTION TO DISMISS OR STAY

Pursuant to the September 20, 2007 PROTECTIVE ORDER in this action This Exhibit is filed separately under seal